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In the Supreme Court
of the United States

OCTOBER TERM 1970

No. ~~1736~~ 70-196

UMPQUA RIVER NAVIGATION COMPANY,
an Oregon corporation,

Petitioner,

v.

STATE OF OREGON, acting by and through its STATE FORESTER, and WESTERN LANE FOREST PROTECTIVE ASSOCIATION, a nonprofit corporation of the State of Oregon,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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a nonprofit corporation of the State of Oregon,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Umpqua River Navigation Company, an Oregon corporation, prays that a writ of certiorari issue out of this Court to review the judgment of the Supreme Court of the State of Oregon entered in the above-entitled case.

OPINIONS BELOW

The opinion of the Supreme Court of Oregon appears in 91 Or. Adv. Sh. 1167, 478 P.2d 631 (1970); and appears in full in the appendix (A. 33-57).* The mandate appears in the appendix (A. 58).

The trial court issued a memorandum opinion which does not appear in any official or unofficial reports. It appears verbatim in the appendix (A 15-33).

JURISDICTION

The judgment sought to be reviewed is dated December 23, 1970, and it, as well as the opinion of the Oregon Supreme Court, was entered on the same date (R. 179 and 180).

A motion to extend the time for filing a petition for rehearing was timely filed (R. 181, 182) and an order extending the time for its filing to and including February 11, 1971, was entered on January 11, 1971 (R. 183). A petition for rehearing was filed in the Oregon Supreme Court and has been certified as part of the record in this case. The filing of the petition for rehearing suspends further proceedings until it is disposed of under the Rules of the Supreme Court of Oregon. 246 Or., Rule 38, p. 23.

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* References herein are as follows: "A" refers to Appendix hereto; "Tr." refers to the transcript of testimony; "R." refers to the documents filed of record in the courts below; and "Exh." refers to the original exhibits. The transcript, the court files with index thereto, and the original exhibits have been certified by the clerk below and filed in this Court.

The order of the Supreme Court denying the petition for rehearing was entered on February 23, 1971 (R. 183A, A. 58-59). The mandate, although dated December 23, 1970, was issued by the court after the petition for rehearing was denied.

The statutory provisions believed by petitioner to confer on this Court jurisdiction to review the judgment in question are 28 U.S.C. § 1257(3); and 28 U.S.C. § 2101 (c) (pp. 4-5).

QUESTIONS PRESENTED

1. Whether the officials of the State of Oregon acting in that capacity performed an unlawful search and seizure of evidence in violation of petitioner's rights under Amendment IV of the United States Constitution, and made applicable to the states by Amendment XIV, Section 1, when they, without petitioner's knowledge or consent and by trespass upon petitioner's personal property, or in violation of criminal statutes, seized, conducted inspections of and obtained evidence which they intended to use against petitioner in litigation in the Oregon courts.

2. If such an unlawful search and seizure was made, whether the laws requiring suppression of evidence unlawfully obtained in violation of constitutional guarantees require suppression thereof in litigation where the state seeks a money judgment in civil litigation rather than criminal sanctions.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment IV, Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Amendment XIV, Section 1, Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Jurisdiction

28 U.S.C. § 1257(3):

* * *

> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or

claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

28 U.S.C. § 2101(c):

* * *

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

* * *

The sections of Oregon Revised Statutes which may be involved are printed in the appendix A. 60-63).

STATEMENT OF THE CASE

A. The Facts

This was a civil action at law in which the State of Oregon acting by and through its State Forester and Western Lane Forest Protective Association sought recovery of $929,283 from petitioner, Umpqua River Navigation Company. Western Lane Forest Protective Association was organized to provide fire protection upon forest lands and was under contract with the State of Oregon to provide suppression and control service to the State Forester with re-

spect to fires which it was his duty to suppress (Exh. Z; A. 33).

The recovery was sought as reimbursement for expenses allegedly incurred by the plaintiff to suppress a forest fire in the State of Oregon in 1966. Plaintiffs' demand was based upon two causes of action as set forth in the second amended complaint (A. 1-4). The first alleges defendant was negligent in the origin of the fire and the second alleges that after notice of the fire defendant failed to exert reasonable efforts to extinguish it.

The action was brought under ORS Chapter 477, particularly ORS 477.066, 477.068, and 477.085 (A. 60-63).

The fire started on August 20, 1966. On that date, petitioner was working under a federal contract to improve a stretch of road which passed, in part, through the area of the fire. In the performance of the work, petitioner had in the area various items of equipment powered by internal combustion engines including the vehicle involved in this case, a large flat-wheeled road roller powered by a two-cycle, four-cylinder diesel engine.

Under plaintiffs' theory of the case, the fire was caused when sparks which were emitted from the exhaust stack of the road roller fell upon combustible material at roadside as the roller was operated in the course of the work.

After notice of the fire, the State Forester ordered

an investigation of its origin. On August 21, 1966, representatives of the Forester discovered the flat-wheeled roller on the forest road. That same day, from two sources, they had reason to suspect the roller (Tr. 46-47, 117, 123). Also, it had petitioner's initials imprinted upon it (Tr. 385). It was not operating and was not attended by anyone. The investigator suspected the fire was caused by sparks emitted from the roller (Tr. 59, 72).

The next day, the investigator requested, and was readily given permission to interview, petitioner's employees (Tr. 53). He made no request to examine any of petitioner's equipment at that time or thereafter (Tr. 442). He made no mention of any intention to examine the roller or of his suspicions about it (Tr. 84, 442). That very evening, however, he sought and located a mechanic to examine the roller to see if it emitted sparks (Tr. 59, 72). He engaged this mechanic and, subsequently, two other experienced diesel mechanics to examine the roller. Without the permission of any representative of the defendant and without the knowledge of defendant, these mechanics, accompanied by representatives of the Forester, went to the place where the roller was, made their examination, and conducted their tests (Tr. 84, 124, 126).

Three separate examinations were conducted on August 23, August 24, and August 25 of 1966. At the time the first examination was made, the investigator knew definitely the roller belonged to petitioner (Tr.

58, 115). On at least one occasion secrecy from all but State personnel was imposed by posting a lookout (Tr. 99). Each of these examinations followed essentially the same pattern as the others. They consisted of a visual and mechanical examination of the roller during which the mechanics partially dismantled it and then reassembled it (trial court findings A. 20).

On at least two occasions, they removed the exhaust stack and took scrapings therefrom. They submitted the material obtained for laboratory analysis. They removed one of two air cleaners more than once. On one occasion they removed a blower housing screen. To do this, it was necessary to remove the exhaust stack, a U-shaped air intake housing and the screen itself. At least one air box plate was removed, possibly on two occasions (A. 20-21).

In each instance, they started the roller engine and actually moved the machine on at least two occasions. They ran it against a bank at roadside and then deliberately overloaded the engine by running it at full throttle and engaging the clutch (A. 21).

The activity of these mechanics in dismantling the roller and operating it as they did under conditions where abrasive contaminates could enter the engine created a condition where excessive wear would commence and ultimately produce a change in the condition of the engine (Tr. 532, 535, 543). For this reason, petitioner's experts were unable to test and examine the engine meaningfully to determine its

condition at the time the fire started or determine whether the State's claims about its condition at that time were accurate (Tr. 548-554, 562, 563, 586).

The State maintained the secrecy of its efforts. Petitioner did not learn of the tinkering with the engine until many months after it had occurred (Tr. 497).

It is unnecessary to a consideration of the issues in this case to discuss in detail the findings which the State experts claimed to have made or the conclusions they drew from those findings. It is sufficient to summarize and say that they made observations which persuaded them the roller was, at the time of the fire, capable of emitting sparks; that it had uncommon or abnormal amounts of combustible carbon deposited in its exhaust stack; and that there were other indications of faulty maintenance and abnormal conditions which showed that this roller could have started the fire, probably did cause it, and that petitioner was negligent in using the roller at the time and place it did.

A trial was held upon the question of the admissibility of this evidence. At its conclusion the trial court ruled the evidence had been illegally obtained in violation of petitioner's rights to protection against unreasonable searches and seizures (A. 27-28). It entered an order suppressing the evidence and all of it was excluded from evidence at the subsequent trial of the case to a jury on its merits (R. 137; A. 14-15).

The verdict was for the defendant, the trial court entered judgment thereon, and plaintiffs appealed to the Oregon Supreme Court.

Oregon Supreme Court ruled the trial court had committed error in suppressing the evidence. It reversed the judgment and ordered a new trial (A. 57-58). It is that order and judgment of the Supreme Court against which this petition is directed.

B. The Manner of Raising the Issue Below

The complaint in this case was filed by the State on December 21, 1966 (R. 3). At this time petitioner was unaware that the examinations by the State's investigators had been made and, of course, had no knowledge of the extent thereof or anything about what had been done (Tr. 497).

A number of motions and preliminary pleading matters followed the filing of the complaint, and ultimately the second amended complaint was filed on May 16, 1968 (A. 1-5). This was the pleading of plaintiffs upon which both trials were held.*

* The certified copy of the second amended complaint as filed in this Court contains additions and deletions by interlineation. These were made after the conclusion of the evidence at the trial on the merits as a result of motions and rulings by the court at that time. This pleading is reproduced in the appendix as originally filed and was in that form at the time the issues involved here were tried. Similarly, petitioner's pleading as it was during the trial of the present issues is the one printed in the appendix. A subsequent amended answer to second amended complaint was filed after the equity trial (R. 138). This was done so there would be a pleading which did not contain the allegations of the equitable defense, because in Oregon practice the pleadings are given to the jury.

During the period of time between the filing of the original complaint and the filing of the second amended complaint, pretrial discovery was conducted by the parties in the form of depositions. Petitioner also did investigation of its own.

During the course of the discovery and investigative work, petitioner learned of the State's activity above described and of the details of it.

The responsive pleading of petitioner, its answer to second amended complaint, was filed May 21, 1968 (A. 5-10; R. 64). In this pleading petitioner raised the issues tendered by this petition in its second affirmative answer and equitable defense pleaded therein (A. 8-10).

The relief prayed for was an order suppressing all of the evidence and information obtained by means of or as a result of the wrongful conduct of the State and enjoining the use of the evidence in the pending litigation.

Sought also was other relief including an injunction against the State from maintaining the pending action on the ground that, in addition to illegally obtaining its evidence, the State had so altered the condition of the roller that defendant was unable to meet the claims made about it and adequately defend itself. This relief was not granted by the trial court, but it is not an issue herein.

On June 5, 1968, trial began upon the equitable defenses thus asserted. This trial lasted through June

7, 1968 and all of the evidence bearing on the issue here presented was heard at that trial.*

In addition to the request in the prayer of the answer to the second amended complaint for the suppression of the evidence, petitioner also filed a separate motion to suppress the evidence (A. 10-13; R. 99). The motion itself was not physically filed until the conclusion of the trial.

This was merely a procedural occurrence. It was stipulated by the parties and agreed to by the court that the actual motion might be filed at the time it was but that all parties would consider it to be before the court for determination from the outset of the trial on the equitable defense (Tr. 653-654; A. 17-18). In other words, the parties agreed, and the court concurred, that the trial on June 5-7, 1968 was to determine the issues presented by the motion to suppress and tendered by this petition, as well as the question of whether the action should be enjoined because of the conduct of the State (e.g. Tr. 29-38, 470, 471, 472, 485, 486).

The manner of presentation of the issue in the Oregon Supreme Court further appears from its opinion (A. 35-36).

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* It is the transcript of testimony and exhibits from this trial which has been certified as the record herein. The issues presented hereby were not involved in the subsequent jury trial on the merits except that the suppression order was applied and the evidence was excluded.

REASONS FOR ALLOWING THE WRIT

This case presents directly, upon a record which is neither complicated nor lengthy, an important issue concerning basic rights under the Fourth Amendment to the United States Constitution. Petitioner asks whether prior decisions of this Court prohibit a state government from using evidence obtained by an unlawful search and seizure when it seeks recovery of damages in a civil action at law. It presents the question of whether fundamental rights which are accorded to a defendant in a criminal case also protect the defendant when the sanction sought by the state is a recovery of a substantial sum of money.

It is true the petition also states as a question whether, under the facts of this case, an unlawful search and seizure did occur. Finding that it did is, of course, an essential foundation to petitioner's contentions on the ultimate question involved. It is not, however, a question which need occupy much time or effort on the part of this Court.

This is true for several reasons. The search was clearly a trespass. It was conducted without a warrant. It was conducted without knowledge or consent of petitioner. The agents of the state probably violated one or more criminal statutes of the State of Oregon when they performed the search.

The trial court found as a matter of fact and law that an unlawful search had occurred (A. 27-28). It found that if the proceeding had been one to enforce

the criminal statute (ORS 164.070), which proscribed the same acts as were relied upon by the state in this civil proceeding, the evidence would have been suppressed (A. 23). The Oregon Supreme Court did not find otherwise and assumed for the purpose of its decision that an unlawful search and seizure had occurred.

This question is in the first instance for the determination of the courts below so that their findings and conclusions, although not binding upon this Court, are given the usual weight accorded such decisions in cases of this kind as in any other case. *Ker* v. *State of California*, 374 U.S. 23, 32-33, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963); *Mapp* v. *Ohio*, 367 U.S. 643, 653, 81 S. Ct. 1684, 6 L. Ed. 2d 1081; *Elkins* v. *United States*, 364 U.S. 206, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1959).

Thus, although the unlawfulness of the search is expressed as a question presented, it is really not one which would require extensive consideration in this Court.

The substantial federal question presented is whether the Fourth Amendment protection against an unlawful search and seizure extends to a defendant in a civil action for money damages.

This is the federal constitutional question of substance which the Supreme Court of the State of Oregon has decided which has not been determined heretofore by this Court, and which the Oregon court has

decided in a way probably not in accord with applicable decisions of this Court. It has decided directly that, notwithstanding illegality, the evidence obtained in an unlawful manner is nonetheless admissible. It reached this decision for the sole reason that the case was a civil proceeding not a criminal one.

The reasoning used by the Oregon court itself conflicts with traditional concepts of constitutional law. It has said the constitutional protection here involved will be extended on the basis of the remedy sought by the state and that the defendant in civil proceedings has less protection or is to be treated differently from that same defendant under the same facts in a criminal prosecution. [It is to be noted that the alleged conduct or omissions of the defendant relied upon for civil recovery here would have supported, without any substantial change in allegation or proof, a criminal conviction under ORS 164.070 (A. 62-63).]

The effort of the Oregon court to justify its conclusion by classifying potential defendants according to wealth, social position in the community, and similar criteria, requires no serious argument or citation of authority to demonstrate its error. It is not only without support in any case in this Court, but is patently illogical.

The thesis of the opinion below is that persons in civil litigation, are "typically" of an economic or social class which enables them to pursue civil remedies in court or present effective complaints to state agencies when their rights have been violated. For this

reason, it says, they do not need, and are not entitled to, the same protection accorded criminal defendants who are "typically" not possessed of the same influence with the government or standing in the community.

The same falacious argument would compel a conclusion that "typical" criminal defendants of wealth and respectable community status are not entitled to constitutional protection because of their status. For example, prosecution for criminal antitrust violations or fraud against the government by businesses nearly always involves a class of defendants whose social or economic position in the community makes them not "typical" of the usual criminal defendant. Under the theory of the court below, defendants in such cases could not be heard to complain about unconstitutional invasion of their right to protection against unreasonable searches and seizures because their status enables them to protect themselves by civil remedy and they consequently have no need for, or right to, constitutional protection.

Conversely, is a defendant in a civil fraud action brought by the State for the recovery, for instance, of welfare or unemployment benefits fraudulently obtained "typically" a person whose reputation, social standing and economic resources are such that he may successfully pursue a civil remedy for trespass or other unreasonable search and seizure and is therefore not in need of or entitled to the constitutional shield?

Mere statements of the propositions refute them.

Reasoning of this type in support of conclusions on a vital constitutional question certainly does violence to all of the principles heretofore enunciated by this Court as controlling, when questions of citizen's rights in a contest with his government are decided.

Finally, the decision that illegally seized evidence should only be excluded in a criminal proceeding when obtained by "law enforcement officers" investigating criminal activity is certainly a decision not in accord with applicable decisions of this Court. The precise issue has never been decided by this Court.

In the first place, applicable decisions of this Court have suppressed evidence unlawfully obtained by persons other than "law enforcement officers." The Oregon court has used the phrase "law enforcement officers" in its opinion to mean police officers, and distinguishes them from other public employees who do investigative work for the State (A. 45).

Boyd v. *United States*, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1885) is an early and scholarly dissertation upon the meaning and purpose of the Fourth Amendment. It was not a criminal case, but a forfeiture proceeding. At issue was the constitutionality of a federal statute which authorized customs inspectors to obtain court orders to compel production of papers and other evidence in cases wherein forfeiture was sought of property subject to customs duties when the duty had not been paid by the owner. A criminal prosecution by law enforcement officers was not involved.

The scope of the protection afforded under the Fourth Amendment was, even in that early day, described by the Court in broad terms.

> "The principles laid down in this opinion [*Entiac* v. *Carrington et al*, 19 Howell's State Trials 1029] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, * * *." (116 U.S. at 630).

Further, the opinion speaks of a factor present in the instant case as to whether there is a distinction between a situation where the government after making the search decides to proceed for relief other than the imposition of criminal sanctions when it said:

> "If the government prosecutor elects to waive an indictment and to file a civil information against the claimants—that is, civil in form—can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens and exhort from them the production of their private papers, or, as an alternative, the confession of guilt?" (116 U.S. at 634).

Finally, the *Boyd* court said:

> "It may be that it is the obnoxious thing in

its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and silent deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person *and property* should be *liberally construed* * * *. It is the duty of the court to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon." (Emphasis added) (116 U.S. at 635).

The opinion of the Oregon court in the instant case is certainly contrary to the sweeping principles enunciated by the Court in *Boyd*. Nowhere does that decision say or hold that the constitutional guarantee contended for here does not apply simply because a proceeding other than a criminal one is involved. Its clear intendment is to the contrary.

Weeks v. *United States*, (1913) 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652, was a criminal case and what was said must, of course, be read in that context. Nevertheless, the following is found therein and indicates again the Oregon court in this case has not given full effect to prior decisions of this Court. There, the Court said:

"The effect of the Fourth Amendment is * * * to forever secure the people, their persons, houses, papers and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, *whether accused of crime or not*, and the duty of giving it force and effect is obligatory upon all entrusted under our

> Federal system with the enforcement of the law." (Emphasis added) (232 U.S. at 344).

Mapp v. *Ohio,* 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, is, of course, a landmark decision in the field. It is there Amendment XIV is invoked and the search and seizure restrictions imposed by Amendment IV are made applicable to the activity of state government. Although it was a criminal case, it certainly expressed no holding or inference that the exclusionary rule placed by it upon evidence obtained illegally by state officials was confined in its application to "law enforcement officials" in criminal cases only. In fact, the Court said:

> "We hold that *all evidence* obtained by search and seizure in violation of the constitution is, by that same authority, inadmissible in a state court." (Emphasis added) (367 U.S. at 655).

The court logically and correctly concluded that to hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.

So, in this case to hold that, although the state could not use the results of its search and seizure to prosecute defendant criminally, it could use the same evidence to bankrupt defendant by electing to file a civil proceeding for the expense of abating a nuisance, would be, in reality to withhold the privilege and its enjoyment as an "empty promise."

A civil forfeiture proceeding rather than a criminal prosecution was involved in *One 1958 Plymouth*

Sedan v. *Pennsylvania*, 380 U.S. 693, 85 S. Ct. 1246, 14 L. Ed. 2d 170 (1965).

In that case, the Pennsylvania Supreme Court's decision was that the exclusionary rule, an essential part of the Fourth Amendment, applied only to criminal prosecutions and was not applicable in a forfeiture proceeding which the Pennsylvania Court deemed *civil* in nature. This Court granted certiorari to consider what it described as a most important question of whether a constitutional exclusionary rule applies to forfeiture proceedings—a question on which there had been conflict in both state and federal decisions.

The question presented by the instant petition, it is submitted, is of equal importance. In fact, it is essentially the same question. The type of proceeding involved is slightly but not materially different. The Oregon Supreme Court, however, has failed to recognize the essential similarities and has rendered a decision contrary to the clear import of the case.

Upon the merits, this Court reversed the Pennsylvania Court and, relying heavily upon *Boyd* v. *United States*, supra, held the protection extended to cases other than criminal proceedings. The Court very correctly reasoned that if the owner of the forfeited vehicle had been prosecuted for crime, the penalty would have been minimal from a financial point of view compared to the loss resulting from forfeiture of the vehicle. In this connection, this Court said:

> "It would be anomalous indeed, under these circumstances, to hold that in the criminal pro-

> ceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible." (380 U.S. at 701).

This was the reasoning of the trial court in this case but it was not followed by the Oregon Supreme Court; although under ORS 164.070, a misdemeanor prosecution carrying relatively minimal penalties could have been instituted at its option by the State (A. 62-63).

Camera v. *Municipal Court* (1967) 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930, is a recent opinion from this Court on the subject. It represents a further step in the direction contended for by petitioner herein and indicates strongly the decision of the Oregon court is not in accord with prior decisions of this Court. In that case, the proceeding was an application for a writ of prohibition following a refusal by the owner of an apartment house to permit an inspection of it without a warrant to determine whether the building conformed with fire, housing, and sanitary regulations. This Court held the inspection was invalid and said:

> "The basic purpose of this amendment (Fourth Amendment) as recognized in countless decisions of this court is to safeguard the privacy and security of individuals against arbitrary invasion by government officials." (387 U.S. at 527).

Furthermore, this Court said:

> "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment *only* when the individual is suspected of criminal behavior." (Emphasis added) (387 U.S. at 530).

And, finally:

> "In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual * * *." (387 U.S. at 534).

Here is another case from this court not involving "law enforcement officers" as that term was used by the Oregon court in its opinion herein and not involving the criminal proceeding. Certainly, the opinion of the Oregon court is inconsistent with *Camera*.

The opinion below ignores the clear intendment and direction of the law as expressed in *Camera* and in *See* v. *City of Seattle*, 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967). The last mentioned case involved essentially the same principles as were involved in *Camera* and in fact the two cases were argued together. *See* involved whether the Fourth Amendment protection would extend to code enforcement inspections upon a commercial structure as distinguished from a private residence. The state court had declined to extend the protection that far and this Court re-

versed, holding that such investigations were subject to the restrictions inherent in the Fourth Amendment.

The Oregon court noted the existence of *Camera* and *See*. It acknowledged these decisions extended the Fourth Amendment beyond its application only to law enforcement officers (A. 38-39). This makes the conclusion, later in its opinion, that Fourth Amendment protection extends only to criminal or quasi-criminal proceedings in which law enforcement officers, as distinguished from other public investigative employees, are involved patently at odds with the opinions of this court (A. 49-50).

A great number of cases exist in the lower federal and state courts, holding directly that the constitutional guarantee against unlawful searches and seizures (and enforced by suppression of the evidence) extends to civil litigation. Among the types of proceedings in which it has been applied by these courts are tax collection proceedings by the United States, proceedings leading to the discharge of state and federal employees, civil antitrust proceedings, legislative investigations, license revocation proceedings, nuisance abatement proceedings, juvenile proceedings and commitment proceedings. Undoubtedly, there are cases which hold to the contrary. Undoubtedly it is this situation and the state of the law which led the court in *Pizarello* v. *United States*, 408 F.2d 579 (2d Cir. 1969) to observe:

"Widespread uncertainty is prevalent on the issue of whether evidence, inadmissible in a crim-

inal case, can be used for other purposes, and the Supreme Court has yet to resolve the problem."

In summary, petitioner submits this writ should be allowed for the following reasons:

The court below was clearly wrong in its conclusions that constitutional protection against unlawful searches and seizures applies only to cases involving "law enforcement officers" who illegally seize evidence and attempt to make use of it in criminal or quasi-criminal proceedings. The prior opinions of this Court not only do not so limit the right but actually extend it to matters involving other than law enforcement officers in cases not criminal in the usual sense of the word.

In other cases, this Court has recognized that virtually the same question as presented hereby is a significant question for consideration. The Oregon court has decided that question contrary to prior cases of this Court and in disregard of the basic principles enunciated therein. Neither the decision nor the reasons therefor are in accord with prior decisions of this Court.

The effort to distinguish those prior cases on the grounds of the type of proceeding involved is unsupported by any decision in this Court. The rationale that the protection is unneeded by defendants of wealth and high social or economic position is not only unsupported by any decision of this Court but, more importantly, ignores the whole fabric of consti-

tutional law enunciated by this Court from the beginning of the Republic.

For the foregoing reasons it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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May, 1971

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF DOUGLAS

STATE OF OREGON, acting by and through its State Forester, and WESTERN LANE FOREST PROTECTIVE ASSOCIATION, a non-profit corporation of the State of Oregon, *Plaintiffs,* vs. UMPQUA RIVER NAVIGATION COMPANY, an Oregon corporation, *Defendant.*	)	No. 31027 SECOND AMENDED COMPLAINT

COME NOW the Plaintiffs and for cause of action allege as follows:

I

During all of the times and dates herein mentioned, Plaintiff State of Oregon was acting by and through its State Board of Forestry and State Forester.

II

During all of the times and dates herein mentioned, Plaintiff Western Lane Forest Protective Association, was a non-profit corporation, duly organized and existing under the laws of the State of Oregon, and was duly qualified to transact business in the State of Oregon.

III

During all of the times and dates herein mentioned, Defendant Umpqua River Navigation Company was a corporation duly organized and existing

under the laws of the State of Oregon, and was duly qualified to transact business in the State of Oregon.

IV

During all of the times and dates herein mentioned, the United States of America was the owner of, and Defendant was an operator on and in possession of a part of, the following described forest land, situated in Douglas County, Oregon, to-wit:

South half (S ½) of Section 5, Township 20 South, Range 7 West of the Willamette Meridian.

V

That during the early afternoon of August 20, 1966, Defendant was carrying on industrial activity and development on the land described in paragraph IV hereof. That said work included the operation of power-driven machinery by Defendant on said land. That during said afternoon, and for some time prior thereto, the weather was hot and dry and the forest, trees, grass and debris on said land was readily susceptible to the start and spread of fire. That at said time there was in full force and effect a proclamation of the Governor of the State of Oregon, dated May 23, 1966, declaring closed season on forest land, a copy of which proclamation is attached hereto as Exhibit A, and by this reference made a part hereof. That the land described in paragraph IV hereof lies within the areas described in said Exhibit A.

VI

That under the aforesaid, Defendant was negli-

gent in the origin and spread of the fire mentioned in paragraph VII hereof as follows:

(1) Defendant used and operated said machinery when such was capable of emitting and did emit hot exhaust and sparks therefrom, all of which Defendant knew or should have known.

(2) Defendant used and operated said machinery under low humidity and high temperature and other conditions then and there existing which were conducive to the start and spread of fire, all of which Defendant knew or should have known.

(3) Defendant failed to have said machinery, and particularly a water tank truck and a diesel powered roller equipped with a shovel and axe and a fire extinguisher of an approved size and capacity kept in constant repair and readiness for constant use.

VII

That as a proximate result of said negligence of the Defendant, the Defendant did cause a fire to be set on the land described in paragraph IV hereof during the afternoon of August 20, 1966. That the Defendant had actual knowledge of the existence of said fire immediately upon its origin and permitted the same to burn uncontrolled and did fail and neglect to exert every reasonable effort to control and extinguish the same. That said fire continued to burn until about October 15, 1966, and while so burning it spread to other forest land in Douglas and Lane Counties, Oregon, and did burn over approximately 43,000

acres of forest land until controlled and extinguished as is hereinafter set forth.

VIII

That during all of the times and dates herein mentioned, Plaintiff Western Lane Forest Protective Association was a forest protective agency under agreement with the State Forester, by authority and approval of the State Board of Forestry, for the prevention and suppression of forest land against fire, including forest land upon which said fire originated and burned.

IX

On account of the Defendant negligently originating said fire, and the failure, refusal and neglect of Defendant to make every reasonable effort to control and extinguish the said fire, Plaintiffs were required to and did during the period from August 20, 1966, to October 15, 1966, both dates inclusive, control and extinguish said fire; the cost of so doing was the sum of — (sic) for controlling and extinguishing said fire by Plaintiffs, which sum was the necessary and reasonable cost of said work.

X

By reason of the foregoing there became due and owing from Defendant on October 15, 1966, the full sum of $929,283.00, no part of which has been paid, although demand therefor has been made, and said sum, together with interest thereon at the rate of six per cent (6%) per annum from October 15, 1966, is now due and owing from Defendant to Plaintiffs.

WHEREFORE, Plaintiffs demand judgment against the Defendant for the sum of $929,283.00, together with interest thereon at the rate of six per cent (6%) from October 15, 1966, together with Plaintiffs' costs and disbursements herein.

/s/.....

Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF DOUGLAS

STATE OF OREGON, acting by and through its State Forester, and WESTERN LANE FOREST PROTECTIVE ASSOCIATION, a non-profit corporation of the State of Oregon, *Plaintiffs,* vs. UMPQUA RIVER NAVIGATION COMPANY, an Oregon corporation, *Defendant.*	No. 31027 ANSWER TO SECOND AMENDED COMPLAINT

Defendant, for its answer to Plaintiffs' Second Amended Complaint herein, admits Paragraphs I, II and III thereof, admits that the United States of America was the owner of the forest land described, that on and prior to August 20, 1966, Defendant was engaged in the performance of work of resurfacing a road upon said lands, that various power-driven vehicles were being used by Defendant on said road in the performance of said work, that on or about May 23, 1966, a proclamation was issued in the name of the Governor

of the State proclaiming "* * * the beginning of the closed season for 1966" in certain areas, including said land, admits that a fire occurred on said lands and that Plaintiffs expended money combating (sic) said fire, but Defendant denies each other allegation of said Second Amended Complaint and particularly denies that said fire resulted from any negligent act or omission of Defendant.

FIRST AFFIRMATIVE ANSWER AND LEGAL DEFENSE

I

At all of the times mentioned in said Second Amended Complaint Plaintiffs claimed to be experts in the field of forest management including the prevention, suppression and control of fire on forest lands.

At and immediately prior to the commencement of the fire Plaintiffs had facilities for determining and knew or should have known of the weather conditions prevailing and reasonably to be anticipated and knew that defendant and other persons working in the area relied upon Plaintiffs to notify them of unusual weather conditions and other unusual fire hazards requiring extraordinary precautions against fire; that Plaintiffs were charged by law with the duty during a closed season to determine if the forest land described in the Complaint was susceptible to fire due to low humidity, high winds or high temperature, and, if so, to give Defendant and each other person entering or being on the land notice of such conditions

and that operation of power-driven machinery in any operation on such land was unlawful unless approved by the State Forester because, in his judgment, the use of such power-driven machinery, would not increase the fire hazard conditions.

II

If the weather and other conditions were as alleged in Paragraph V of the Second Amended Complaint and if the fire resulted from operation of Defendant's machinery, as Plaintiffs claim, then Plaintiffs were negligent in the following particulars which proximately caused or contributed to cause said fire and the resulting damage:

1. Plaintiffs failed to issue and give notice to Defendant and Defendant's employees, then being upon said land, notice of said weather conditions and the hazard caused thereby.

2. Plaintiffs failed to notify Defendant of any restriction upon its use of power-driven equipment, or to close down Defendant's activity, or request Defendant to cease its operations or modify them in any way.

3. Plaintiffs failed to inform Defendant or its agents or employees of any claimed defect or danger in operating Defendant's power-driven machinery under the circumstances and conditions then and there prevailing.

4. Plaintiffs failed and neglected to forecast the weather conditions for Saturday, August 20, 1966, with reasonable accuracy or to give any notice thereof to Defendant.

SECOND AFFIRMATIVE ANSWER AND EQUITABLE DEFENSE

I

Following outbreak of the fire referred to in Plaintiffs' Second Amended Complaint and while it was burning, Plaintiffs, without the knowledge or consent of Defendant, trespassed upon and took possession of Defendant's property, to-wit: the machinery of the Defendant referred to in Plaintiffs' Second Amended Complaint, and converted said machinery to their own use by operating, dismantling, tampering with and altering the condition of the machinery as it existed on August 20, 1966, at the time of said fire and immediately thereafter, and rendering it impossible to ever again put said machinery in the same condition it was in at said time.

II

The foregoing activities were performed by Plaintiffs clandestinely, without giving any notice to Defendant of Plaintiffs' claims against Defendant, and concealing from Defendant their contention that Defendant's machinery was defective or had caused the fire referred to in Plaintiffs' Second Amended Complaint. Thereafter, Plaintiffs continued to conceal from Defendant for many months the fact that they had so trespassed upon, operated, dismantled, tampered with and altered said machinery.

III

By reason of the foregoing conduct of the plaintiffs, Defendant was prevented from and denied the

opportunity of observing Plaintiffs' activities or of conducting its own examinations and tests of its machinery before its condition was altered, which would have demonstrated the unlikelihood that it was capable of starting the fire.

IV

As a result of Plaintiffs' said conduct and its charges herein, other complaints have been filed in court against Defendant accusing it of having started such fire by using such allegedly defective machinery and seeking recovery of damages against Defendant as follows:

> (Identified with particularity are six other pending legal actions in the state circuit and federal district courts of Oregon seeking recovery from defendant of a total of $8,800,000 plus costs and attorney fees.)

V

By reason of the foregoing wrongful and unlawful conduct on the part of Plaintiffs, Defendant's ability to defend this and such other litigation arising out of the fire referred to in Plaintiffs' Second Amended Complaint has been seriously impaired and Defendant's property has been placed in jeopardy.

VI

That Defendant has no plain, adequate or speedy remedy at law.

WHEREFORE, Defendant prays for a decree and judgment herein, as follows:

1. Suppressing all evidence and information acquired by means of or as a result of the foregoing wrongful and tortious conduct of Plaintiffs and enjoining them and each of them from using it in the pending or any other litigation;

2. Enjoining Plaintiffs and each thereof from maintaining the pending action or any other action based on charges that Defendant's machinery was defective or that it caused the fire referred to in Plaintiffs' Second Amended Complaint;

3. Declaring that Plaintiffs and each thereof are obligated to indemnify and save Defendant harmless from any loss, cost or damage it may suffer as a result of this and other litigation based in whole or in part upon contentions that Defendant's machinery started said fire;

4. Granting such other relief as the Court may deem equitable in the premises;

5. Dismissing Plaintiffs' complaint herein.

/s/_____
Of Attorneys for Defendant

MOTION TO SUPPRESS EVIDENCE

Defendant moves the Court for an order suppressing and prohibiting the use by plaintiffs in evidence in any trial of any of the issues in this cause of the results of the examinations conducted by plaintiffs and their agents of defendant's power-driven Buffalo Springfield Roller, which examinations took place on

or about August 23, 24 and 25, 1966, and also any evidence which said examinations, or any of them, or the results thereof, led plaintiffs to discover or to render any opinions based thereon.

This motion is based upon the affidavit of Bruce Spaulding, hereunto annexed and by this reference made a part hereof.

/s/----------
Attorneys for Defendant

AFFIDAVIT

STATE OF OREGON)
) ss.
County of DOUGLAS)

I, BRUCE SPAULDING, being first duly sworn on oath say that I am one of the attorneys for defendant in the within cause; that following the outbreak of the fire referred to in plaintiffs' second amended complaint herein, and while said fire was burning, to-wit on August 23, 1966, and again on August 24, 1966, and again on August 25, 1966, plaintiffs and their agents and employees without the knowledge and consent of defendant, trespassed upon, tampered with, and took possession of defendant's property, to-wit, the power-driven machinery referred to in plaintiffs' second amended complaint herein, and wrongfully and unlawfully converted said machinery to their own use by dismantling, operating, tampering with and altering the condition of said machinery as it existed on and prior to August 20,

1966, at the time of the fire referred to in said complaint and immediately thereafter, and by said actions rendered it impossible to ever again put said machinery in the same condition as it was at the time of the fire, or to perform any tests on said machinery which would prove the condition of said machinery at the time of said fire.

Said activities of the plaintiffs and their agents and employees were performed clandestinely without giving defendant any notice that plaintiff claimed or suspicioned that defendant was in any way responsible for the fire, or that said machinery "* * * was capable of emitting and did emit hot exhaust and sparks therefrom" and in performing said activities, plaintiffs concealed from defendant their contentions and alleged suspicions that defendant's said machinery was in any way defective or had caused the fire referred to in said complaint, and thereafter plaintiffs continued to conceal from defendant for many months, the fact that they had so trespassed upon, operated, dismantled, and tampered with and altered said machinery.

Defendant was thereby prevented from and denied the opportunity of observing plaintiffs' said activities or of conducting any examinations and tests of its own of said machinery before said condition was so altered, and if defendant had been afforded the opportunity of making such examinations and tests, defendant would have been able to demonstrate that said machinery was incapable of emitting excessively

hot exhaust or of emitting sparks under any conditions comparable to the conditions prevailing at the time and place of the commencement of said fire.

Any and all evidence obtained by plaintiffs, or either of them, on the occasions above referred to, was obtained unlawfully.

/s/ *Bruce Spaulding*
BRUCE SPAULDING

SUBSCRIBED and Sworn to before me this 5th day of June, 1968.

(Notarial acknowledgement
and Official Seal.)

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF DOUGLAS

STATE OF OREGON, acting by and through its State Forester, and WESTERN LANE FOREST PROTECTIVE ASSOCIATION, a non-profit corporation of the State of Oregon, *Plaintiffs,* vs. UMPQUA RIVER NAVIGATION COMPANY, an Oregon corporation, *Defendant.*	No. 31027 DECREE

THIS MATTER having come on for hearing upon the issues presented by the Second Affirmative Answer and Equitable Defense contained in the Defendant's Answer to the Second Amended Complaint of the Plaintiffs herein; and the Court having heard

the testimony of witnesses and arguments and statements of counsel; and being fully advised in the premises;

The Court hereby does find for the Plaintiffs and against the Defendant, and as a conclusion of law therefrom does find that the Defendant is not entitled to the relief prayed for in said Second Affirmative Answer and Equitable Defense and the same should be dismissed.

IT THEREFORE IS ORDERED, ADJUDGED AND DECREED that said Second Affirmative Answer and Equitable Defense be and the same hereby is dismissed.

DATED this 3rd day of July, 1968.

/s/ *Don H. Sanders*
Circuit Judge

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR DOUGLAS COUNTY

STATE OF OREGON, acting by and through its State Forester, and WESTERN LANE FOREST PROTECTIVE ASSOCIATION, a non-profit corporation of the State of Oregon, *Plaintiffs,* vs. UMPQUA RIVER NAVIGATION COMPANY, an Oregon corporation, *Defendant.*	No. 31027 ORDER RE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

This matter came on for hearing on June 5, 6 and

7, 1968, upon defendant's motion to suppress evidence, and the affidavit in support thereof, the Court heard evidence adduced by the parties and took the matter under advisement and now being fully advised finds that said motion is well taken.

IT IS, THEREFORE, ORDERED that defendant's said Motion to Suppress Evidence be and the same hereby is allowed.

DATED this 9th day of July, 1968.

/s/ *Don H. Sanders*
Circuit Judge

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF DOUGLAS

STATE OF OREGON, acting by and through its State Forester, and WESTERN LANE FOREST PROTECTIVE ASSOCIATION, a non-profit corporation of the State of Oregon, *Plaintiffs,* vs. UMPQUA RIVER NAVIGATION COMPANY, an Oregon corporation, *Defendant.*	No. 31027 MEMORANDUM (Entered June 20, 1968)

Although that which preceded and resulted in this opinion is of record in the reporter's notes, a prefacing explanation will probably make this memorandum somewhat more understandable. Plaintiffs' action seeks to recover from defendant the cost of fighting a forest fire allegedly caused by defendant. Plaintiffs

also allege defendant, as an "owner or operator", failed to make a reasonable effort to attempt to control or extinguish the fire.

The Oregon statutes upon which plaintiffs base this suit against defendant are, in inverse order, O.R.S. 477.085, which reads:

> "Any person who wilfully or negligently sets a fire or causes a fire to be set, which fire burns on land within the exterior boundaries of a forest protection district or within one-half mile of such boundaries, and for which efforts to control or extinguish the fire in order to protect forest land within the district from fire are exerted by the forester or any forest protective association or agency under contract or agreement with the board, is liable for the actual costs incurred by the forester, association or agency in such efforts. The costs shall be recovered from the person liable therefor in the same manner as costs recovered under O.R.S. 477.068."

and O.R.S. 477.068, which, in its pertinent parts, reads:

> "In case an owner or operator fails to make the effort required by O.R.S. 477.066, or is wilful, malicious or negligent in the origin of the fire, the actual costs incurred by . . . in controlling or extinguishing the fire shall be recovered from such owner or operator . . .";

and O.R.S. 477.066, which provides, in part:

> "Each owner and operator of forest land on which a fire exists or from which it may have spread, notwithstanding the origin or subsequent

spread thereof, shall make every reasonable effort to control and extinguish such fire immediately when its existence comes to his knowledge, without awaiting instructions from the forester, and shall continue until the fire is extinguished."

In response to plaintiffs' complaint defendant alleged affirmative answers of (1) contributory negligence on part of plaintiffs and (2) an equitable defense. Plaintiffs filed motions and demurrers against both affirmative answers. Rulings were previously made on the attacks on the first affirmative defense. Counsel for plaintiffs are to prepare an order on such rulings.

Plaintiffs' counsel submitted on the record the motions and demurrers against the second affirmative answer. The motion to strike all of the second affirmative defense will be denied. The motion to strike paragraph IV of the second affirmative answer will be allowed. The motions to strike other portions of such affirmative defense will be denied; and plaintiffs' demurrer thereto will be overruled. It could be here noted it is immaterial whether the motion to strike paragraph IV is allowed or not, as the evidence taken, in the Court's opinion, failed to sustain the allegation therein in any event.

In prior proceedings, it became apparent that the parties disagreed as to which procedural route defendant should take, i.e., whether defendant should be allowed the equitable defense as part of its case in chief, or whether defendant's remedy should be in the form

of a motion to suppress evidence. It also became apparent that, whether heard as an equitable defense or whether heard as a motion to suppress, in either event, practically the same evidence would necessarily be presented to the Court. Defendant had not filed the motion to suppress because it did not wish to be asserting inconsistent positions. The parties agreed, however, that the evidence could be heard and that thereafter the Court could consider the evidence as being available for purposes of ruling upon the equitable defense and/or the motion to suppress. Hence, the evidence was taken, arguments made and the matter taken under advisement. Defendant's motion to suppress was filed at this time, to be considered as an alternatively-sought relief in the event defendant did not prevail in its equitable defense. Parenthetically, the arguments were to the point and of unusual assistance to the Court.

As was suggested by one of defendant's counsel, it may well be that whether an equitable defense has been made out depends upon whether a motion to suppress ought to be allowed on the basis that plaintiffs had illegally obtained evidence. In other words, unless the Court finds that there is illegally-obtained evidence, the equitable defense has not been made out, in any event. In any case, assuming that plaintiffs have not illegally obtained some evidence, the Court is of the opinion that the equitable defense has not been made out.

There are a number of reasons for the foregoing

conclusion. As must surely be recognized by defendant, plaintiffs, or at least the State Forester, is statutorily charged with undertaking to recover fire-fighting costs, as he now seeks in this case. Also, inadequately protected forest lands are legislatively declared a nuisance, the costs of abatement thereof being recoverable in the name of the State. Moreover, fire wardens have duties involving investigations and enforcement of criminal law, specifically O.R.S. 164-.070, which duty is imposed by O.R.S. 477.360 et seq. As counsel for plaintiffs have urged, not only is there unquestionably some implied investigative authority, there is some specific authority to investigate. Having such duties, assuming no illegal conduct, the state officers, agents and investigators cannot be faulted for zealous pursuit of investigations, nor can it be considered inequitable, under such duties, that findings are kept confidential. The other side of the coin would be (which even defendant must appreciate) an investigator should keep his inquiries and findings to himself. A failure to do so could easily result in slanderous rumor which could be substantially detrimental in many cases. Nor does reason or logic require that the subject of the investigation necessarily know of the investigation or its result. Under such duties, the state representatives would be derelict in their duty did they not pursue their inquiry diligently and rapidly, and, in light of the present-day results of prejudicial publicity prior to a trial of a criminal case, maintain the information as a confidence. Refraining from advising defendant that it is being investigated

and apprising defendant of the results as obtained may be no more than good and proper investigative technique. The good intentions of this defendant's personnel and apparent willingness to objectively search out the cause of the fire hand in hand with authorities may be assumed for these purposes; but in many known cases the unscrupulous practices on the part of persons knowing themselves to be under investigation demand a rule of as much confidentiality as is practicable on the part of the investigators.

In any event, while there may well be, in some other cases, circumstances which would give rise to an equitable defense of the character here urged by defendant even though there is no illegality unless there is illegally obtained evidence justifying the defense in this case, it does not appear to this Court that such defense has been made out.

The real issue here is essentially a legal question. The controlling facts are probably not in any serious dispute. Unquestionably, plaintiffs' examination of defendant's self-powered road roller, on each occasion examination by state representatives occurred, was without defendant's knowledge or consent. From the evidence it appears, more probably than not, that defendant did not learn of plaintiffs' tests, nor the results thereof, until on and after early April, 1967. Plaintiffs had different persons examine the roller on three consecutive days, August 23, 24 and 25, 1966. Essentially, the examinations followed somewhat the same pattern. The exhaust stack was removed and

scrapings taken on at least two occasions. An air cleaner, that is, one of two, was removed more than once. On one occasion a blower housing screen was removed, necessitating the removal of the stack, a U-shape air intake housing and the screen itself. At least one air box plate was removed, probably on two occasions. In each instance the roller was started, the engine run, and, the machine actually moved a short distance on at least two occasions. When thus examined, the roller was not at the scene of the fire but, rather, at a location about a mile or so in a westerly direction.

The question is whether the foregoing constitutes illegally-obtained evidence.

There are three statutes suggested by defendant, one or more of which defendant contends may have been violated by representatives of the state, namely O.R.S. 164.650, O.R.S. 164.660 and O.R.S. 164.670. In that order these statutes read:

> "With the exception of an authorized officer, marshall, (sic) constable or policeman, any person who, without the consent of the owner or person lawfully in charge of a motor vehicle, as defined in O.R.S. 483.014, climbs upon or into such motor vehicle, whether it is at rest or in motion; or, while it is at rest or unattended, attempts to manipulate any of the levers, the starting crank or other device, brakes or mechanism, or sets the vehicle in motion, shall be punished . . ."
>
> * * * * *
>
> "Any person who, individually or in association with one or more others and against the will

or without the consent of the owner of any motor vehicle, as defined in O.R.S. 483.014, wilfully breaks, injures, tampers with or removes any part of such vehicle for the purpose of injuring, defacing or destroying it, or temporarily or permanently preventing its useful operating for any purpose, or in any manner wilfully or maliciously interferes with or prevents the running or operation of such motor vehicle, shall be punished . . ."

* * * * *

"Every person who takes or uses without authority any vehicle, watercraft or aircraft without intent to steal it, or is a party to such unauthorized taking or using, shall be punished. . . . This section applies to any person employed by the owner of a vehicle, watercraft or aircraft or anyone else who, by the nature of his employment, has the charge of or the authority to drive the vehicle, watercraft or aircraft if it is driven or used without the owner's knowledge or consent; . . ."

O.R.S. 483.014 defines a "motor vehicle" as:

"(4) 'Motor vehicle' means any vehicle which is self-propelled."

Plaintiffs urge they were "authorized officers" as must be contemplated by O.R.S. 164.560. If true, that might exempt plaintiffs under this particular statute. The other two statutes have no such exception, however. But the question is whether they have such express or implied authority in the first instance. If no such authority exists, then it would appear that one or more of the three statutes would apply.

Hypothetically, as was suggested by the Court to counsel at the time of argument, had pranksters or someone just for "kicks" or for the reason that some person (anyone other than a party to a lawsuit) had just wanted to see the machine blow black smoke and sparks (if that is what it would do), all without defendant's knowledge and consent, then it would appear to the Court that one or more of the above statutes would be applicable. To project the hypothesis further, assuming that a representative of the State, a fire warden or the Forester's investigator, was investigating for purposes of attempting to obtain a prosecution under O.R.S. 164.070, and assuming evidence was thus obtained invoking O.R.S. 164.650, 164.660 and 164.670, and assuming a motion to suppress in such criminal prosecution, a Court then would have no alternative except to grant the motion.

Another hypothesis is of aid. If the State had the right to do what it did, surely this right would include the right to take the machine elsewhere and conduct examinations and tests. Can it be validly contended that, if the right exists, the right is only to dismantle, inspect and experiment on the spot? Considered in this view, what is the right, if any, and the extent of it, for which the State contends? As was noted by this Court in a very recent case, rhetorical questions are not answers; such questions do, however, assist in reasoning. What are the owner's rights? Does he have no right to be present? How may he assure he is not prevented from testing to prove the opposite of what the State probably expects to prove?

Does the fact it is the State which wishes to determine if the machine will emit smoke and sparks make the act legal? What the State does and the results it obtains may well result in far greater detriment to defendant than any damage, if any, by a third-party prankster. Counsel have cited cases in which it has been held that if one party wilfully acts in a manner which deprives the other party of evidence, or a defense, proof thereof is a defense. It seems to the Court that to argue that such power exists by virtue of O.R.S. Chap. 477 proves too much. The same argument would legitimatize what would otherwise clearly be illegal search and seizure. Such argument would likewise sanction a myriad of governmental activity which would almost completely abrogate the Constitutional rights to be "secure" in one's property. Article I, sec. 9 of Oregon Constitution provides, in part:

> "No law shall violate the right of the people to be secure in their persons, houses, papers and effects, against unreasonable search, or seizure; . . ."

The United States Constitution provides, in the Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, . . ."

In short, government, at any level, acting through its various agencies, have no special license in ordinary affairs, absent emergency or disaster calling for such

extraordinary exercise of power as in martial law, or exercise of extraordinary police power. Only in most unusual instances can ends justify the means; otherwise, all levels of governmental activity must conform to law, both civil and criminal.

Plaintiffs urge that there is, of necessity, some implied investigative powers conferred by O.R.S. Ch. 477 provisions. With this the Court would agree. In fact, there may be language found from which it is fair to say carry expressed duty or power to investigate. However this may be, the Court has no quarrel with the general statement. It is the extent to which the expressed or implied powers authorize which is really under consideration.

Unquestionably, there must be some power to act in the face of disasters or huge-scale calamitious (sic) occurrences. The exercise of awful powers can be justifiably sanctioned. Fiery holocausts in cities have empowered destruction of private property for purposes of back-firing and other means. It may be assumed that a forest fire in this day and age and in this locality carries with it extraordinary power for some such similar purposes. By statute, no able-bodied man can refuse to assist a warden without a reasonable excuse. O.R.S. 477.375.

The point to be made here, however, is that no such justification is apparent in this case. That is to say, a wholesale destruction of personal property or a disregard of property rights in whole or in part cannot be justified by the circumstances. It is to be here

noted that representatives of the State were not acting under emergency circumstances; necessity generated no power to ignore property or ignore property rights. An inquiry was being made to determine the cause of a fire—activity wholely (sic) separate and apart from controling (sic) and/or extinguishing the fire. In and of itself, the inquiry was a proper activity. Whether undertaken solely for purposes of imposing financial responsibility or for purposes of criminal responsibility, or both, would not seem to be otherwise too material, save and except for the applicability of a usual rule in a criminal proceeding to a civil case. Plaintiffs cite a number of statutory provisions having to do with fire preventative measures which the State may take. Some specifically provide or necessarily imply the power to inspect. This may be admitted and yet not be controlling. As was stated a number of times (as memory now serves in both testimony and argument) the representatives of the State were engaged in doing what they had done in the past and believed they were entitled to do. The whole point is the investigation was not undertaken in furtherance of fire-preventative measures, nor as regulatory under statutes to regulate activity and/or equipment. The inquiry made was not any of the inspection procedures or investigation expressly or impliedly authorized before the fact of a fire, but, rather, was and must be conceded to be an inquiry after the fact of a fire. The point of this last distinction is that the conduct of plaintiffs' representatives cannot be justified on the basis that it is a necessary exercise of police

powers. The question is not whether the representatives of the State could have conducted an inspection of the machine before the fire, or as a condition of letting it be operated, or to see if it was properly equipped with shovel, fire-extinguisher and the like. Even defendant must concede such powers are expressed or implied or a proper part of the exercise of a regulatory or police power. The purpose of this investigation was to fix responsibility, after the fact. The evidence would simply not permit any other conclusion. The exercise of expressed or legitimately-implied police power to determine that equipment conforms to required standards before permitting it to be operated cannot be also used as authority to conduct an investigation of the vehicle to determine whether it was later the instrumentality of a wrong.

Parenthetically, the investigation which the State wished to conduct could have been conducted and the information obtained could have been obtained, all with legal sanction. Once a case is filed, procedures are available to a party to depose, inspect, and even experiment. A suit for injunctive relief might well have been available. In other words, if it was information for this case which was being sought, procedures were undoubtedly available by which such evidence could have been obtained legitimately pursuant to court order, under which all rights of the defendant could be adequately protected. This Court feels compelled to the conclusion the rights contended for by plaintiffs were not conferred by O.R.S. Chap. 477, and that the actions of the State's representatives were

in violation of one or more of the criminal statutes cited above. It would follow the evidence was illegally obtained.

The question then is: Is the same rule of exclusion as applicable in criminal cases also applicable in a civil case? In other words, do rules of law prohibiting illegal search and seizure and later suppression of evidence obtained thereby apply in civil cases?

This precise question has been passed upon by a Federal District Court this year, being *State of Iowa* v. *Union Asphalt & Roadoils, Inc.*, 281 F. Supp. 391 (1968). The Iowa case was an anti-trust action for treble damages. A state district court order was obtained by which records of defendant were obtained. They were purportedly obtained under a statute authorizing seizure for purposes of action or suit under a certain state statute. It was evident that no suit or action was ever seriously contemplated under the state statute authorizing seizure and, moreover, that the evidence was undoubtedly seized solely for purposes of the anti-trust case actually filed. After citing authorities that illegally seized evidence may be suppressed in a civil case, the Court said:

> "The conclusion that suppression of illegally seized evidence is a proper procedure in a civil case is supported by the following decisions: (citations) In United States v. Blank, supra, a civil action for assessment of taxes, the Court ordered suppression of illegally seized evidence stating that 'Our decision today follows necessarily from the reasoning explicitly expressed by the Supreme

Court in One 1958 Plymouth Sedan v. Com. of Pennsylvania.' Similarly, the decision in three state cases above relied on the Plymouth Sedan case.

"Support for this conclusion may also be found in statements of the Supreme Court such as that in Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914): '*This protection reaches all alike, whether accused of crime or not. . . .*' Also, in Abel v. United States, 362 U.S. 217, 80 S. Ct. 683, 4 L. Ed.2d 668 (1959), Mr. Justice Brennan dissented from the majority finding that a search had not been unconstitutional and made the following statement:

> "'We are told that the governmental power to make a warrantless search might be greater where the object of the search is not related to crime but to some other "civil" proceeding—such as matter bearing on the issue whether a man should forcibly be sent from the country. The distinction is rather hollow here, where the proof (sic) that turn up are in fact given in evidence in a criminal prosecution. And the distinction, again, invites a trial of the officers' purposes. But in any event, I think *it perverts the Amendment to make this distinction. The Amendment states its own purpose, the protection of the privacy of the individual and of his property against the incursions of officials; the "right of the people to be secure in their persons, houses, papers, and effects."* See Boyd v. United States, 116 U.S. 616, 627 (6 S. Ct. 524, 530, 29 L. Ed 746.) (sic) Like most of the Bill of Rights it was not designed to

be a shelter for criminals, but a basic protection for everyone; to be sure, it must be upheld when asserted by criminals, in order that it may be at all effective, but it "reaches all alike whether accused of crime or not." Weeks v. United States, supra, at (232 U.S. at page) 392, (sic) (34 St. (sic) Ct. at page 344, 58 L. Ed 652) *It is the individual's interest in privacy which the Amendment protects, and that would not appear to fluctuate with the "intent" of the invading officers.* It is true that the greatest and most effective preventive against unlawful searches that has been devised is the exclusion of their fruits from criminal evidence, see Weeks v. United States, supra; Boyd v. United States, supra; but it is strange reasoning to infer from this that the central thrust of the guarantee is to protect against a search for such evidence. * * *' " (italics added)

The Iowa Federal District Court also said:

"The decisions in Camara v. Municipal Court of the City and County of San Francisco, 387 U. S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967) and See v. City of Seattle, supra, holding that search warrants must be obtained to inspect homes and business premises, may be taken to indicate that *the right to be free from unconsented searches is the foremost concern of the Fourth Amendment and that the use of illegally seized evidence in a criminal prosecution is merely a common incident of the search which is proscribed. The cases extending the exclusionary*

rule to civil proceedings are based on the conclusion that it is the right of privacy that is protected and that there exists no valid distinction for varying the exclusionary rule in a civil case. In Hinchcliff vs. Clark, 230 F. Supp 91 (N.D. Ohio 1963), rev'd. on other grounds, 371 F.2d 697 (6th Cir. 1967), the District Court pointed out that society's interest in proof obtained by illegal means is less in a civil case than in criminal cases in which the evidence is suppressed. This Court is persuaded that the evidence seized from the four defendants must be suppressed." (italics added)

Research by counsel and the Court suggest no reason why constitutional guarantees should be applicable only in criminal cases. In the *Iowa* case, as well as others cited therein, the courts refer to various actions as "quasi-criminal" because some of the cases involve a statutory right to exact a penalty or make a forfeiture of property. This sounds like justification to bolster the ruling. In the opinion of this Court there is no such need to justify the application of a Constitutional provision, either state or federal. And there is known to this Court no reason why the mandate of the Constitution is not applicable at any time, place or occasion. The rationale of the rule of exclusion is that the best way to assure that no governmental representative, at any level of government, engages in illegality is to preclude such representative from using any information thus obtained or from benefitting therefrom in any way.

The question presented is relatively a recent rec-

ognition of an already existing law. This Court is persuaded the Iowa case was correctly decided, applicable to this case, and controlling. The question then is whether the defendant has made its equitable defense in view of a finding of illegally obtained evidence or, alternatively whether only the motion to suppress is to be granted.

Mr. Hinsdale testified he did not believe the roller caused the fire, nor did he suspect that it did. This may be true; nonetheless, he did cause a number of testings to be conducted. His motivation must surely have been that he had some reason to believe defendant might well be called upon to defend a case such as this case. He could hardly be heard to say the contrary. All that took place after examination by State representatives occurred with defendant's knowledge and consent. The evidence is that meaningful tests could be made. Although what the state representatives did altered the roller and that it was not thereafter precisely the "same" machine, this conduct and activity, according to the State's mechanics, would not have prevented defendant from conducting effecacious and meaningful examinations of the roller. Even defendant's expert agreed this to be the case. The conclusion must be, therefore, that the State's examination did not prevent defendant from making its defense. Under all these circumstances, the argument that defendant could have and might have made other tests, had it known of the State tests, or the results thereof, is not compelling. Accordingly, the holding of this Court will be that

the equitable defense has not been made out and that the alternative motion to suppress will be allowed.

Counsel for plaintiffs will prepare the appropriate order on the motions and demurrer to the second affirmative defense and the appropriate decree against defendant on the equitable defense. Defendant's counsel will prepare the appropriate order allowing the alternative motion to suppress.

Dated June 20, 1968.

'/s/ Don H. Sanders
Circuit Judge

IN THE SUPREME COURT OF THE STATE OF OREGON

State of Oregon, acting by and through its State Forester, and Western Lane Forest Protective Association, a nonprofit corporation of the State of Oregon,

Appellants and Cross-Respondents,

v.

Umpqua River Navigation Company, an Oregon corporation,

Respondent and Cross-Appellant.

Appeal from Circuit Court, Douglas County
Don H. Sanders, Judge

(Filed December 23, 1970)

DENECKE, J.
Reversed and remanded.

DENECKE, J.

The plaintiffs are the State Forester and a governmental subdivision created for fire fighting pur-

poses. Plaintiffs brought this statutory proceeding to recover the fire suppression costs incurred in fighting a large forest fire known as the Oxbow fire. Plaintiffs allege that the fire was started by the negligence of the defendant. A jury returned a verdict for defendant and plaintiffs appeal.

On August 20 the defendant, Umpqua River Navigation Company, was working on a federal contract to resurface a forest road. Umpqua spread gravel and then compacted it by running a roller over it. On that date, at a place near where the roller was operating, several fires broke out which allegedly originated the Oxbow fire. On August 21 an investigator for the State Forester observed Umpqua's road roller parked on the forest road near the area where the fire allegedly started. The investgator suspected that the fire might have been caused by the roller emitting sparks. During the next few days while the fire was still going, he brought several mechanics and others to examine the roller. These persons took off the exhaust stack to look for carbon and remove carbon specimens for laboratory testing. They also took off the air cleaner for inspection and operated the roller in a limited area. All this was without the knowledge or consent of Umpqua.

The plaintiffs subsequently commenced this action against Umpqua alleging, among other things, that it was negligent in operating a roller which threw sparks and caused the fire. The defendant filed an equitable answer alleging that because of plaintiffs'

inspection and operation the roller was altered and Umpqua was prevented from subsequently conducting relevant tests to demonstrate its freedom from negligence. Defendant asked that any evidence plaintiffs obtained from these inspections and tests should, therefore, be suppressed and plaintiffs should be enjoined from proceeding with this litigation against defendant. Defendant also filed a motion to suppress all evidence obtained as a result of plaintiffs' inspection and testing of the roller. After an evidentiary hearing in equity, the trial court held the equitable defense had not been made out; however, the motion to suppress was granted and plaintiffs assign this as error.

The motion to suppress did not specify any particular legal basis. The trial court memorandum and the briefs on appeal, however, are clear that the defendant before the trial court and on appeal based its contention on constitutional grounds. Defendant contends that the fourth amendment to the United States Constitution and Art I, § 9, of the Oregon Constitution, prohibiting unreasonable search and seizure, have been violated. The defendant further contends that under the principle of Mapp v. Ohio, 367 US 643, 81 S Ct 1684, 6 L Ed2d 1081, 84 ALR2d 933 (1961), and the Oregon law preceding Mapp v. Ohio, for example, see State v. McDaniel, 115 Or 187, 209, 231 P 965, 237 P 373 (1925), evidence discovered or seized in violation of the constitutional prohibition against unreasonable search and seizure is inadmissible. Defendant contends that this principle

rendering the evidence inadmissible is as applicable in a civil proceeding in which the state is seeking to introduce the evidence as it is in a criminal proceeding. The trial court suppressed the evidence upon the ground that the search was unconstitutional.

Umpqua contends the search and seizure was unconstitutional because it was accomplished by trespasses upon Umpqua's personal property and by violation of criminal statutes prohibiting entry on or injury to motor vehicles. ORS 164.650, 164.660 and 164.670.

The plaintiffs argue that whatever search and seizure occurred, it was not in violation of the federal and state constitutions, and, furthermore, admitting for the purpose of argument that it was in violation, the evidence obtained thereby should not be excluded because this is a civil proceeding, not a criminal case. This latter issue is the basis for our decision. We do not intend thereby to infer that an illegal search and seizure was made. If an enclave of privacy is what is protected by the Fourth Amendment, we have doubt whether any enclave of privacy was penetrated in this case.

The exclusionary rule, where it is applicable, is now required by the federal constitution. Mapp v. Ohio, supra (367 US 643). Our analysis of the decisions of the United States Supreme Court leads us to the same conclusion as that of the Second Circuit. "Widespread uncertainty is prevalent on the issue of whether evidence, inadmissible in a criminal case,

can be used for other purposes, and the Supreme Court has yet to resolve the problem." Pizzarello v. United States, 408 F2d 579, 585 (2d Cir 1969). Mapp itself gives no express clue. It was a criminal case.

The closest in point is One Plymouth Sedan v. Pennsylvania, 380 US 693, 85 S Ct 1246, 14 L Ed 2d 170 (1965). In that case state law enforcement officers on the suspicion that the occupants of a car were violating the state liquor laws, stopped a car. They searched the car and found untaxed liquor. The car and the liquor were seized and the state started a statutory proceeding to forfeit the car. In that proceeding the trial court found the forfeiture could be sustained only upon the basis of evidence that was obtained in violation of the federal constituional provision barring illegal search and seizure. The forfeiture was, therefore, dismissed The Pennsylvania Superior and Supreme Courts both held contrary to the trial court upon the ground that the forfeiture proceeding was a civil proceeding and the exclusionary rule was only applicable in criminal prosecutions. Com. v. One 1958 Ply. Sdn. (McGonigle), 199 Pa Super 428, 186 A2d 52 (1962), 414 Pa 540, 201 A2d 427 (1964). The United States Supreme Court held the exclusionary rule was applicable to the forfeiture proceeding. The primary reason for the holding was "a forfeiture proceding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law." 380 US at 700.

The court relied upon Boyd v. United States, 116 US 616, 6 S Ct 524, 29 L Ed 746 (1885). In that case the United States Attorney filed a forfeiture proceeding against items seized for failure to pay custom duties. An act of Congress provided that the government could secure an order of the court requiring the importer of the merchandise to bring into court the invoice for the merchandise. The Court held the statute unconstitutional because it authorized an unconstitutional search and seizure. The Court in *Boyd* stated:

> "* * * We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences (sic) committed by him, though they [the proceedings] may be civil in form, are in their nature criminal. * * * The information, though technically a civil proceeding, is in substance and effect a criminal one. * * * As, therefore, suits for penalties and forfeitures, incurred by the commission of offences (sic) against the law, are of this quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution. * * *" 116 US at 634.

The present case does not have any criminal character. The proceeding is to recover actual costs and nothing more.

Umpqua strongly urges that Camara v. Municipal Court, 387 US 523, 87 S Ct 1727, 18 L Ed 2d 930 (1967), and See v. City of Seattle, 387 US 541, 87 S Ct 1737, 18 L Ed 2d 943 (1967), are dispositive.

In both, the Court held that under the Fourth Amendment a person could not be convicted for refusing to allow an administrative inspection without a warrant. *Camara* involved an inspection to determine whether the building code was violated and in *See* there was a fire safety inspection. These decisions do extend the Fourth Amendment beyond its previous application only to law enforcement officers. They do not, however, pass upon the question of whether or not evidence secured in an administrative search without a warrant and, therefore, in violation of the Fourth Amendment, will be excluded from evidence in a subsequent civil action.

The decisions of some federal and state courts hold that evidence seized in violation of the Fourth Amendment is inadmissible in a civil case. The trial court in the instant case relied heavily upon a recent federal trial court decision, a treble damage antitrust case, excluding illegally seized evidence.

Rogers v. United States, 97 F2d 691 (1st Cir 1938), was a civil action for custom duties and the court held illegally obtained evidence inadmissible. The court relied upon a statement of Mr. Justice Holmes in Silverthorne Lumber Co. v. United States, 251 US 385, 40 S Ct 182, 64 L Ed 319, 24 ALR 1426 (1920): " '[T]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely the evidence so acquired shall not be used before the court, but that it shall not be used at all.' " 97 F2d 692.

Pizzarello v. United States, 408 F2d 579 (2d Cir 1969), is a proceeding to collect unpaid wagering taxes. The evidence held illegally obtained was secured by law enforcement officers when Pizzarello was arrested for gambling. The government tried unsuccessfully to prosecute the defendant criminally and to enforce a forfeiture on the gambling funds seized. In this tax collection proceeding the court held the evidence inadmissible, stating:

> "* * * Absent an exclusionary rule, the Government would be free to undertake unreasonable searches and seizures in all civil cases without the possibility of unfavorable consequences. In such a situation, while the matter has not been settled by Supreme Court decision, it seems clear, even under a view of the law most favorable to the Government, that evidence so obtained would be excluded. * * *" 408 F2d at 586.

Two state court decisions hold evidence illegally seized is not admissible in a proceeding nominally civil. Carson v. State, 221 Ga 299, 144 SE2d 384 (1965); Carlisle v. State, 276 Ala 436, 163 S2d 596 (1964). Both of these, however, were at least quasi-criminal,—suits to abate gambling houses as public nuisances.

In Walker v. Penner, 190 Or 542, 227 P2d 316 (1951), we stated:

> "The Federal rule respecting the suppression of evidence procured by an unreasonable search and seizure, and which rule has been adopted in many states, refers largely, if not entirely, to

criminal and quasi-criminal proceedings. * * *"
190 Or at 547.

The doctrine of excluding evidence illegally seized has changed so drastically since this decision that we find it advisable to reinvestigate the issue.

The answer to the question of how broad is the exclusionary rule ought to be found in the reasons for the rule.

The rule started in the federal system in Weeks v. United States, 232 US 383, 34 S Ct 341, 58 L Ed 652, LRA 1915B 834 (1914). In that case a United States Marshall (sic) illegally broke into the defendant's home and seized defendant's papers. At a trial of defendant for the sale of lottery tickets, the trial court refused to exclude these from evidence because of the manner in which the government obtained the papers. The United States Supreme Court held they should have been excluded.

In Wolf v. Colorado, 338 US 25, 69 S Ct 1359, 93 L Ed 1782 (1949), the Court refused to apply that exclusionary rule to state prosecutions. Mr. Justice Frankfurter wrote:

> "* * * But the immediate question is whether the basic right to protection against arbitrary intrusion by the police demands the exclusion of logically relevant evidence obtained by an unreasonable search and seizure because, in a federal prosecution for a federal crime, it would be excluded. As a matter of inherent reason, one would suppose this to be an issue as to which

men with complete devotion to the protection of the right of privacy might give different answers. When we find that in fact most of the English-speaking world does not regard as vital to such protection the exclusion of evidence thus obtained, we must hesitate to treat this remedy as an essential ingredient of the right. * * *

"* * * * * *

"The jurisdictions which have rejected the Weeks doctrine have not left the right to privacy without other means of protection. Indeed, the exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found. We cannot, therefore, regard it as a departure from basic standards to remand such persons, together with those who emerge scatheless from a search, to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford. Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective. * * *" 338 US at 28-31.

Mapp v. Ohio, supra (367 US 643), overruled Wolf v. Colorado, supra (338 US 25). *Mapp* involved another illegal search and seizure by law enforcement officers and a state criminal prosecution. One of the principal bases stated for overruling

Wolf was "[t]he experience of California that such other remedies [other than exclusion in criminal cases] have been worthless and futile is buttressed by the experience of other States. The obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been recognized by this Court since Wolf." 367 US at 652.

Any confusion about the basis for the exclusionary rule was settled by the reasoning in Linkletter v. Walker, 381 US 681, 85 S Ct 1731, 14 L Ed 2d 601 (1965). That was another state criminal case in which the illegal search had been conducted by a law enforcement officer. The Court held Mapp v. Ohio, supra (367 US 643), would not be applied to cases finally decided prior to the *Mapp* decision. The Court so decided because the reason for the exclusionary rule was to deter lawless police action and this would not be accomplished by excluding evidence which was secured by lawless police action occurring before Mapp v. Ohio.

> "* * * Mapp had as its prime purpose the enforcement of the Fourth Amendment through inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action. Indeed, all of the cases since Wolf requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action. * * *
>
> "* * * In rejecting the Wolf doctrine as to the exclusionary rule the purpose was to deter the lawless action of the police and to effectively en-

force the Fourth Amendment. * * *" 381 US at 636-637.

This import of the majority opinion in *Linkletter* is accented by the dissenting opinion of two justices:

> "One reason—perhaps a basic one—put forward by the Court for its refusal to give Linkletter the benefit of the search and seizure exclusionary rule is the repeated statement that the purpose of that rule is to deter sheriffs, policemen, and other law officers from making unlawful searches and seizures. The inference I gather from these repeated statements is that the rule is not a right or privilege accorded to defendants charged with crime but is a sort of punishment against officers in order to keep them from depriving people of their constitutional rights. * * * [T]he undoubted implication of today's opinion that the rule is not a safeguard for defendants but is a mere punishing rod to be applied to law enforcement officers is a rather startling departure from many past opinions, and even from Mapp itself. * * *" 381 US at 380-381.

We realize that dissenters on occasion "overstate" the holding of the majority; however, in this instance we find it inescapable that the majority was holding that the exclusionary rule for evidence illegally seized "is not a right of privilege accorded to defendants charged with crime." If it were, such a right or privilege, it would have to be applied to those tried after *Mapp* as well as before. The assistance of counsel is such a right and, therefore, such right was accorded those tried before as well as after Gideon

v. Wainwright, 372 US 335, 83 S Ct 792, 9 L Ed 2d 799, 93 ALR2d 733 (1963).

Synthesizing *Mapp* and *Linkletter*, evidence illegally obtained by law enforcement officers will be excluded from criminal prosecutions for the purpose of deterring law enforcement officers from taking such illegal action.

The present action, as we stated, is not criminal or quasi-criminal. The state employees conducting the alleged illegal search and seizure were not police officers or other law enforcement officers investigating alleged criminal conduct. Other investigators were employed privately and engaged by the state for their knowledge of diesels. The investigation was instituted by an assistant state forester. The purpose of the investigation was to find the cause of the fire.

We have no information that it is a common practice of state employees investigating the causes of forest fires or of non-law enforcement public employees, generally, to engage in unconstitutional searches and seizures in the performance of their duties. Thus there is no known need to deter unconstitutional conduct of such employees, whereas in Mapp v. Ohio, supra (367 US 643), the court found there was a need to deter law enforcement officers investigating suspected criminal activity.

Also, we are of the opinion that if non-law enforcement government employees do engage in illegal searches and seizures, effective remedies, other

than exclusion of evidence obtained thereby, are available. If the acts of the plaintiffs' agents in this case were illegal, they amounted to the torts of conversion or trespass to personal property. ORS 30.260 et seq. permits tort actions against public bodies. Public employees can be held liable for their torts. ORS 30.280 provides that public bodies may provide liability insurance for their employees, thus creating solvent defendants; and they do. Hale v. Smith, 254 Or 300, 460 P2d 351 (1969). At least in this jurisdiction, juries do return verdicts against state employees for conversion. Mustola v. Toddy, 253 Or 658, 456 P2d 1004 (1969).[1]

It could be argued that under the traditional rules of damages, the award would be so trivial that pursuing a civil remedy might not be worthwhile. If this did prove to be the case, we should consider the possibility of changing the traditional rules of damages for this type of case. This approach certainly should be considered as an alternative to changing the rules of evidence and excluding relevant and competent evidence.

There is another important consideration to be considered in determining whether tort recovery is a sufficient remedy in the type of situation we have before us. It is the realization that when we go outside the type of case in which law enforcement officers commit illegal searches and seizures while in-

[1] We did reverse the judgment entered upon the jury's verdict for the reason that we found there was no conversion as a matter of law.

vestigating suspected criminal activities we are generally concerned with individuals who are much more able to redress their wrongs by legal action. Professor Foote has described the inadequacy of tort remedies in correcting Fourth Amendment violations for the typical criminal defendant:

> "For most potential tort plaintiffs the 'moral aspects of the case' are not very favorable. Very few of them are persons who are respectable in the sense that they have some measure of status and financial security in society and have acquired the kind of reputation which will be 'damaged' by illegal police activity. Most Police action operates at lower levels of society and the great majority of persons who are subjected to illegal arrests or searches and who are therefore potential tort plaintiffs come from the lowest economic levels, or minority groups, or are criminals or suspected of criminality. For such people 'the rules * * * are little more than mere pretensions.' It is not surprising that attorneys are reluctant to take their cases because of the small chances of a recovery 'sufficient to justify the action,' and fear of police retribution may also be a substantial factor in determining such plaintiffs from bringing suit. The 'moral aspects' of the cases of these potential plaintiffs ruin their chances of success in court. They lack the minimum elements of respectability which must be present to form a base upon which the fiction of reparation can operate." Caleb Foote, *Tort Remedies For Police Violations of Individual Rights*, 39 Minn L Rev 493, 500 (1955).

We do not believe that these shortcomings apply

to tort remedies for the typical defendant in a civil action.

We also find support for our position that a tort remedy is effective for Fourth Amendment violations in civil cases in the fact that even when law enforcement officers investigating criminal activity are involved a tort remedy is not necessarily futile if the person subjected to the illegal police activity is not from the classes described by Professor Foote above.

Plaintiffs' verdicts against police officers for illegal arrests were obtained in Paget v. Cordes, 129 Or 224, 277 P 101 (1929) (plaintiff a lawyer and businessman); Christ v. McDonald, 152 Or 494, 52 P2d 655 (1936) (plaintiff described as steadily employed and involved in union activities); Bratt v. Smith, 180 Or 50, 175 P2d 444 (1946) (plaintiff "a sober and industrious citizen").

These latter decisions illustrate that all persons subjected to illegal police activity are not from the group described by Professor Foote; likewise some persons subjected to illegal activity of public employees, other than police investigating crime, will be from such group and, therefore, disadvantaged in attempting to enforce a tort remedy. We must base our decision, however, on the usual circumstances,—what is the usual class of citizens involved.

In addition to a tort remedy, we note that political or administrative action offers an alternative to the exclusionary rule in redressing Fourth Amend-

ment violations. This approach does not offer much help to the typical criminal defendant for many of the same reasons the tort remedy is not helpful. A governor, mayor or police commissioner is not apt to give much credence to a complaint by a person such as Dollree Mapp (Mapp v. Ohio, supra (367 US 643)), suspected of harboring a fugitive and paraphernalia used in the policy racket, or Victor Linkletter (Linkletter v. Walker, supra (381 U.S. 618)), arrested for one burglary while under a two-day surveillance as a suspect in another burglary.

On the other hand, persons who may be subject to illegal searches and seizures by public employees other than police officers investigating crimes are apt to be those kinds of persons to whom public officials will listen when complaints are made. For this reason illegal practices of public employees who are not police officers may very well be effectively deterred by political or administrative action.

In summary, we do not find that illegal searches and seizures outside the area of law enforcement officers investigating crimes occur frequently. In addition, we have not been shown, if such were the practice, that remedies other than exclusion of evidence would be inadequate to deter the continuance of such practice. On the other side of the ledger, we continue to regard a trial as a search for the truth and, therefore, competent evidence should never be excluded except for the most compelling reason. We hold that illegally seized evidence should only be excluded in a

criminal or quasi-criminal proceeding and if obtained by law enforcement officers investigating criminal activity. The order of the trial court excluding the evidence was in error.

The defendant contends that even if the trial court's ruling was incorrect, the plaintiffs were not prejudiced. The defendant contends the evidence was otherwise inadmissible because the tests made by plaintiffs' witnesses were not made under conditions comparable to those existing when the roller allegedly threw sparks starting the fire. Defendant states that the conditions were not comparable because the roller was run up against a bank, then "overloaded" by running it at full throttle and then engaging the clutch. The conditions for such test may not be sufficiently similar to those under which the roller was operating at the time the fire was allegedly started and, therefore, inadmissible; on that issue we express no opinion. However, one of the state's witnesses whose testimony was suppressed testified that the roller threw sparks "even with it out of gear when you throttle it, that is, full throttle for approximately a minute, the sparks would emit from the exhaust stack." These observations would be admissible as the conditions were better than those under which Umpqua operated the roller.

Another assignment of error involves an affirmative defense and an instruction explaining the defense. The issue raised thereby might again arise in the event of another trial. The defendant alleged that

plaintiffs were contributorily negligent in failing to notify defendant of weather conditions rendering forests particularly susceptible to fire damage and failing to notify defendant that because of such conditions it was unlawful to operate power-driven machinery in the area.

In bringing this action, plaintiffs are proceeding under ORS 477.064 to 477.085, dealing with fire abatement. The basis for the action, however, is common-law negligence. Silver Falls Co. v. E. & W. Lbr. Co., 149 Or 126, 141-152, 40 P2d 703 (1935). Therefore, unless there are other reasons to the contrary, the general common-law principle that contributory negligence bars a recovery would apply. Plaintiffs claim the general principle does not apply because the plaintiffs were governmental agencies engaged in a governmental activity attempting to recover costs of abating a public nuisance.

In State v. Shinkle, 231 Or 528, 373 P2d 674 (1962), we held the doctrine of governmental immunity did not prevent a private defendant from raising the defense of contributory negligence when the defendant was sued by the state for damage to a state vehicle allegedly caused by defendant's negligence. Plaintiffs' attempts to distinguish that decision are unsuccessful. Our reasoning in the *Shinkle* case was: "But we prefer to decide the question, not on the basis of implied waiver, but rather upon the ground that our constitution does not cover the case where the state itself institutes suit." 231 Or at 538.

The fact that the activity is termed "governmental activity," if that has an (sic) significance, is of no assistance to plaintiffs. Our former decisions hold that only when the state is acting in a governmental capacity is it immune and State v. Shinkle, supra (231 Or 528), held that when the government is immune, if sued as a defendant, such immunity could not be asserted when it commenced the action and the defendant alleged the government was contributorily negligent.

The fact that the sum plaintiffs are seeking to recover was incurred in abating a public nuisance is immaterial. The public nuisance was based upon alleged negligence and as stated, the usual principles of common-law negligence are applicable.

ORS 477.670 provides:

> "* * * [I]f the forest land * * * is susceptible to damage by fire * * * the forester shall issue, and give to each person entering or being upon such land, notice to that effect. Thereafter * * * the use of any power-driven machinery in any operation on such forest land, is unlawful. * * *"[2]

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[2] ORS 477.670:

"During a closed season in a forest protection district situated west of the summit of the Cascade Mountains, if the forest land in such district, or any part thereof, is susceptible to damage by fire due to low humidity, high wind or high temperature or due to the existence thereon of an excessive amount of flammable debris, or due to a combination of any such conditions, the forester shall issue, and give to each person entering or being upon such land, notice to that effect. Thereafter the use of fire in any form by any person receiving such notice, except for fire control under the super-

Pursuant to this statute the trial court instructed the jury that the plaintiffs were contributorily negligent if they failed to give notice to the defendant of severe fire conditions and that it was, therefore, unlawful to use power-driven machinery, and under the circumstances a reasonably prudent person in plaintiffs' position would have given such notice.[3]

The uncontradicted evidence was that the plaintiffs gave notice of the severe fire conditions by commercial news media, through state and federal forest

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vision of the forester, or the use of any power-driven machinery in any operation on such forest land, is unlawful unless approved by the forester. Approval shall be granted only when in the judgmeny (sic) of the forester the activity will not increase the fire hazard conditions."

[3] "* * * [T]he rules of negligence and the applicable law I have indicated to you make it necessary for the defendants (sic), in their (sic) turn, to prove certain facts by a preponderance of the evidence, in order to prove that plaintiffs were contributorily negligent. These facts are: If the forest lands in the forest protection district involved in this case were at the times involved in this case, that these lands were susceptible to damage by fire due to low humidity, high wind or high temperature or due to the existence thereon of an excessive amount of flammable debris or due to a combination of any such conditions, and if the plaintiffs did, in fact, fail to issue and give notice to the defendant, or its employees who were on the land of these conditions and if plaintiffs did, in fact, fail to notify defendant of any restrictions, modifications—or modifications of defendant's activites or fail to stop defendant's activities completely and if, under all these circumstances, a reasonably prudent person in the place of plaintiff would have given such notice and, in connection with such notice, would have called upon the defendant to modify, restrict or cease its operations, then in that event, defendant would have shown plaintiffs' negligence as alleged. * * *"

departments, weather bureau teletype, and over a forest industries shortwave networth, (sic) of which defendant apparently was not a member. No personal notice was given defendant.

Plaintiffs contend the trial court in effect instructed the jury that the plaintiffs had a duty to personally give to the defendant notice of the severe fire conditions. We do not so interpret the instruction. The court instructed as the statute stated,—the plaintiff forester had a duty to notify persons of the fire conditions. The court then interpreted the statute not necessarily to require personal notice. The trial court translated this interpretation into an instruction by instructing, in effect, that the notice given must be what a reasonably prudent person, under all the circumstances, would have given.

We are of the opinion that the instruction, however, was incorrect in also imposing a duty upon the forester to notify the defendant by any reasonable means, to stop the use of power-driven machinery. The statute does not expressly require such notification and we do not believe such a duty should be implied. The statute provides that when notice of severe fire conditions is given, thereafter the use of power-driven machinery is unlawful. This is an instance when it is reasonable to require persons using power-driven machinery in the woods to know the law. The state forester has, as a matter of practice, at least on occasion, accompanied the notice of severe fire conditions with a notice that the use of power-

driven machinery was unlawful. This practice does not impose on plaintiffs a legal duty to give such notice. No showing has been made that anyone was misled by this practice or relied upon it.

Plaintiffs contend that any failure to give sufficient notice of the fire conditions could not be prejudicial because the defendant had knowledge of the conditions. The defendant knew it was hot and dry and some wind was blowing, but that alone is not sufficient to put defendant on notice that conditions were such as to make the use of power-driven machinery unlawful. "Hot" and "dry" are relative conditions and ORS 477.670 contemplates that the forester shall make a determination of when conditions have become so dangerous that operations must be closed down and then issue notice of his decision.

The defendant, in the event we decided that the order granting the motion to suppress was error, has asked us by cross-appeal to hold that the trial court erred in denying defendant's equitable defense. As previously stated, this defense was that the plaintiffs' examining and operating the roller had altered the machine and thus prevented the defendant from making relevant tests upon it.

Defendant's principal charges against the plaintiffs are that they loosened carbon in the stack, which caused carbon "to come down on things"; they operated the engine without one of the air cleaners in place; and they put the machine under an extremely heavy load by placing it against a bank where it

could not move and then putting it in gear and accelerating.

This is an equitable matter and we try it de novo. The evidence was that some carbon was loosened and subsequently was deposited where it might be sucked into the engine if the engine were operated without the air cleaner. One air cleaner was removed and the engine was operated for perhaps as long as 15 or 20 minutes with the air cleaner off. The engine was being warmed up during this time and the clutch was not engaged. There may have been some dust and particles from the fire floating in the air near the engine at this time. The blower is capable of sucking in particles when not screened by the air cleaner.

The defendant states that all witnesses testified that the engine was in good condition before the fire. At least one of the state's witnesses, Mr. Takayama, did not share that opinion.

The defendant had tests made of the roller on September 2, 1966, about a week after the state's witnesses operated the roller, to determine if the roller could have caused the fire. At this time defendant states the roller was still in good shape. It contends, however, the motor thereafter deteriorated and when it finally learned of the kind of tests plaintiffs had conducted, it was impossible to conduct tests by which it could show the error of plaintiffs' test results.

We find, as did the trial court, that the defendant was able to and did conduct adequate examinations and conduct sufficient tests in September 1966 to en-

able it to present its defense. In addition, we have doubt whether the actions of the state's witnesses substantially changed the condition of the roller. We have read the testimony of the expert called by defendant, Mr. Nelson, and we do not believe he was convinced that the deteriorated condition of the roller in 1967, a year after the fire, was due to the action of the state. We hold that the trial court was correct in finding against the defendant on its affirmative defense.

Reversed and remanded.

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the courtroom in the city of Salem on the first Monday, the 5th day of OCTOBER 1970, WHEREUPON on this WEDNESDAY, the 23rd day of DECEMBER 1970, the same being the 34th judicial day of said term, when the following proceedings were had:

State of Oregon, acting by and through its STATE FORESTER, and WESTERN LANE FOREST PROTECTIVE ASSOCIATION, a non-profit corporation of the State of Oregon, *Appellants and Cross-Respondents*	)	Appeal from DOUGLAS County
v.	)	
UMPQUA RIVER NAVIGATION COMPANY, an Oregon corporation, *Respondent and Cross-Appellant*	)	

This cause on July 14, 1970, having been duly argued and submitted upon and concerning all questions arising upon the record and then reserved for further consideration, and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is error as alleged.

IT THEREFORE IS CONSIDERED, ORDERED and ADJUDGED that the judgment of the court below rendered and entered in this cause be and the same hereby is reversed and set aside and that the cause be remanded to said court for a new trial.

IT FURTHER IS ORDERED that appellants have and recover of and from respondent their costs and disbursements in this court taxed at $40.00.

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun

and held at the courtroom in the city of Salem on the first Monday, the 5th day of OCTOBER 1970, WHEREUPON on this TUESDAY, the 23rd day of FEBRUARY 1971, the same being the 60th judicial day of said term, when the following proceedings were had:

STATE OF OREGON, acting by and through its STATE FORESTER, and WESTERN LANE FOREST PROTECTIVE ASSOCIATION, a non-profit corporation of the State of Oregon, *Appellants and Cross-Respondents* v. UMPQUA RIVER NAVIGATION COMPANY, an Oregon corporation, *Respondent and Cross-Appellant*	Appeal from DOUGLAS County

The court having duly considered petition for rehearing filed by respondent-cross-appellant, and the court being fully advised therein,

IT IS HEREBY ORDERED that said petition be and the same hereby is denied.

OREGON REVISED STATUTES

ORS 164.650 (Volume 1):

With the exception of an authorized officer, marshal, constable or policeman, any person who, without the consent of the owner or person lawfully in charge of a motor vehicle, as defined in ORS 483.014, climbs upon or into such motor vehicle, whether it is at rest or in motion; or, while it is at rest or unattended attempts to manipulate any of the levers, the starting crank or other device, brakes or mechanism, or sets the vehicle in motion, shall be punished * * *.

ORS 164.660 (Volume 1):

Any person who, individually or in association with one or more others and against the will or without the consent of the owner of any motor vehicle, as defined in ORS 483.014, wilfully breaks, injures, tampers with or removes any part of such vehicle for the purpose of injuring, defacing or destroying it, or temporarily or permanently preventing its useful operation for any purpose, or in any manner wilfully or maliciously interferes with or prevents the running or operation of such motor vehicle, shall be punished * * *.

ORS 164.670 (Volume 1):

(1) Every person who takes or uses without authority any vehicle, watercraft or aircraft without intent to steal it, or is a party to such unauthorized taking or using, shall be punished * * *.

(2) This section applies to any person employed by the owner of a vehicle, watercraft or

aircraft or anyone else who, by the nature of his employment, has the charge of or the authority to drive the vehicle, watercraft or aircraft if it is driven or used without the owner's knowledge or consent; and when so operated the owner thereof shall not be responsible.

ORS 483.014 (Volume 3):

As used in this chapter, except where the context otherwise requires:

(1) * * *

(2) * * *

(3) * * *

(4) 'Motor vehicle' means any vehicle which is self propelled.

ORS 477.066 (Volume 3):

(1) Each owner and operator of forest land on which a fire exists, or from which it may have spread, notwithstanding the origin or subsequent spread thereof, shall make every reasonable effort to control and extinguish such fire immediately when its existence comes to his knowledge, without awaiting instructions from the forester, and shall continue until the fire is extinguished.

(2) If the owner or operator fails so to do, or if the fire is burning uncontrolled, the forester, or any forest protective association or agency under contract or agreement with the board for the protection of forest land against fire, and within whose protection area the fire exists, shall summarily abate the nuisance thus constituted by controlling and extinguishing the fire.

ORS 477.068 (Volume 3):

(1) In case an owner or operator fails to make the effort required by ORS 477.066, or is willful, malicious or negligent in the origin of a fire, the actual cost incurred by the forester or a forest protective association or agency in controlling or extinguishing the fire shall be recovered from such owner or operator when necessary by an action prosecuted in the name of the State of Oregon, or such forest protective association or agency, or both.

ORS 477.085 (Volume 3):

Any person who wilfully or negligently sets a fire or causes a fire to be set, which fire burns on land within the exterior boundaries of a forest protection district or within one-half mile of such boundaries, and for which efforts to control or extinguish the fire in order to protect forest land within the district from fire are exerted by the forester or any forest protective association or agency under contract or agreement with the board, is liable for the actual costs incurred by the forester, association or agency in such efforts. The costs shall be recovered from the person liable therefor in the same manner as costs recovered under ORS 477.068.

ORS 164.070 (Volume 1):

The following offenses are punishable by a fine of not less than $25 nor more than $500, or by imprisonment in the county jail for not less than 10 days nor more than 90 days:

(1) Unlawfully setting on fire, or causing to be set on fire, any grass, grain, stubble or other

material being or growing on any lands within the state.

(2) Wilfully or negligently allowing fire to escape from one's own land, or land of which one is in possession or control.

(3) Accidentally setting any fire on one's own land or the land of another and allowing it to escape from control without extinguishing it, or using every possible effort so to do.

(4) Having knowledge of a fire burning on one's own land, or land of which one is in possession or control, and failing or neglecting to make every possible effort to extinguish the same, regardless of whether or not one is responsible for the starting or existence thereof.

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JUN 19 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970

NO. ~~1788~~ 70-196

UMPQUA RIVER NAVIGATION COMPANY,
Petitioner,

v.

STATE OF OREGON, acting by and through its STATE FORESTER, and WESTERN LANE FOREST PROTECTIVE ASSOCIATION, a nonprofit corporation of the State of Oregon,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1738

UMPQUA RIVER NAVIGATION COMPANY,
Petitioner,

v.

STATE OF OREGON, acting by and through its STATE FORESTER, and WESTERN LANE FOREST PROTECTIVE ASSOCIATION, a nonprofit corporation of the State of Oregon,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

THE OPINION BELOW

The opinion of the Supreme Court of Oregon appears at 91 Or Adv Sh 1167, — Or —, 478, P2d 631 (1970) and it is set out in full in the Petition at A33-57.

JURISDICTION

The respondents accept petitioner's statement of jurisdiction.

QUESTIONS PRESENTED

Respondents reject petitioner's conclusory references to trespass and violation of criminal statutes. Otherwise, its statement of questions presented is accepted.

Petitioner has set forth the appropriate constitutional provisions and statutes involved.

STATEMENT OF THE CASE

Respondents accept petitioner's statement of the case with the exception of the paragraph found at pages 8-9 of the statement of facts in which petitioner claims that the examination of its roller by the State Forester's mechanics changed the condition of that machine so that "petitioner's experts were unable to test and examine the engine meaningfully to determine its condition at the time the fire started or determine whether the state's claims about its condition at that time were accurate (Tr. 548-554, 562, 563, 586)." The trial court and, upon review de novo of the equitable defense, the Supreme Court of Oregon both found to the contrary:

> "We find, as did the trial court, that the defendant was able to and did conduct adequate examinations and conduct sufficient tests in September 1966 to enable it to present its defense. In addition, we have doubt whether the actions of the State's witnesses substantially changed the condition of the roller. We have read the testimony of the expert called by the defendant, Mr. Nelson, and we do not believe he was convinced that the deteriorated condition of the roller in 1967, a year after the fire, was due to the action of the State. We hold that the trial court was correct in finding against the defendant on its affirmative defense." 478 P2d at 641, set out at Pet. A56-57.

REASONS FOR DENYING THE WRIT

The writ should be denied because the facts do not support the issue and also because the opinion below is correct.

A. THE FACTS DO NOT PRESENT THE ISSUE

This case does not present a satisfactory set of facts upon which to decide whether the exclusionary rule should be made mandatorily applicable in purely civil litigation in which the state is a party. The Fourth Amendment forbids only "unreasonable" searches and seizures; the conduct of the State Forester was reasonable.

Petitioner contends that the State Forester's examination was unreasonable for three reasons: (1) It was "a trespass;" (2) it was warrantless; and (3) it violated one or more Oregon criminal statutes (Pet. 13). The petitioner's analysis is incorrect.

(1) The examination was without petitioner's consent. It was trespassory only if it was unlawful. It was not unlawful.

(2) The State Forester, not a criminal investigator, was not conducting a criminal investigation in which a search warrant was obtainable under ORS 141.010.[1]

(3) Respondent disputes petitioner's half-hearted suggestions that "agents of the state probably violated one or more criminal statutes" of the joy-riding variety.

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[1] Oregon law does not provide for search warrants in civil cases. ORS 141.010, the search warrant statute, provides:

"A search warrant may be issued upon any of the following grounds:

"(1) When the property was stolen or embezzled.

"(2) When the property was used in the commission of, or which would constitute evidence of, the crime.

"(3) When the property is either in the possession of a person who intends to use it as the means of committing a crime or in the possession of another to whom such person delivered it for the purpose of concealing it or preventing its being discovered."

We will not at this stage analyze the appropriate Oregon criminal statutes; petitioner has merely set them out without analysis at page A60-63. It suffices to say that a technical reading of the statutes, combined with the absolute lack of criminal intent, renders the State Forester's action nonculpable.

The Supreme Court of Oregon did not hold the search to be unlawful. It assumed illegality for the purpose of argument regarding the applicability of the exclusionary rule in civil litigation.

The forester's action was reasonable. Upon notice of the fire, which ultimately destroyed 43,000 acres of forest land, he ordered an investigation of its origin. On the second day, his agent, Norris Joyce, proceeded to the suspected point of origin. He had reason from two sources to suspect that the petitioner's roller was the cause of the fire. He discovered the twenty-year old flat wheeled roller near the point of origin. Petitioner had removed all of its other movable equipment from the fire area, leaving only the roller. It was evident that the roller was equipped with a straight exhaust stack which showed carbon deposits and slobbering oil on its exterior. It had no muffler or spark arrester. The entire area around the roller had been burned.

Mr. Joyce made a visual inspection at that time. At his instance, mechanics made visual and physical examination of the roller over the next few days, including tests wherein they operated the machine and removed and replaced certain of its parts for inspection. The roller was then left where it had been found.

Mr. Joyce clearly had probable cause to believe that the roller was the cause of the fire. Were there a procedure to obtain a warrant to search and seize an instrumentality of civil negligence, he would have had sufficient information upon which to obtain it. He clearly did not act arbitrarily, but rather his conduct was that of a reasonable man.

The Fourth Amendment seeks to protect the privacy of a person in his home and in the contemparary functional equivalents of his home, e.g., the office, the automobile, or the telephone booth. In each case the reasonable expectation and assurance of privacy is meaningful and substantial. Here the petitioner removed all of his other equipment from the scene and left its twenty-year-old roller in the middle of a burning forest. While that may or may not constitute a technical abandonment, it reflects upon reasonableness. The petitioner's reliance upon the exhaust stack as a vessel of privacy was surely minimal. There is no concealment uncovered, no confidentiality breached, no personal privacy violated. Simple examination and tests were performed on an old roller which had been left to the ravages of a forest fire in the reasonable attempt to determine the origin of that fire.

If the Supreme Court is to consider whether the exclusionary rule shall be made applicable to civil litigation, it would seem more appropriate to do so in the case of an unreasonable and substantial invasion of privacy.

B. THE OPINION BELOW IS CORRECT

The opinion of the Supreme Court of Oregon, per Denecke, J., set out fully in the Petition at page A33, is

ably and persuasively reasoned. We add only these few thoughts.

Petitioner cites *Weeks v. United States*, 232 US 383 (1913), *Mapp v. Ohio*, 367 US 643 (1961) and *One 1958 Plymouth Sedan v. Pennsylvania*, 380 US 693 (1965) for the agreed proposition that the exclusionary rule applies to bar unreasonably seized evidence in criminal and quasi-criminal cases. Petitioner then cites *Camara v. Municipal Court*, 387 US 523 (1967) and *See v. City of Seattle*, 387 US 541 (1967)[2] to demonstrate that the Fourth Amendment is also applicable in civil cases and thus the exclusionary rule is equally applicable. The leap is fallacious.

The issue is not whether the Fourth Amendment applies in this case or that. The Fourth Amendment applies to all interaction of citizen and state regardless of whether the matter ever reaches litigation. The question is whether the exclusionary rule is necessary to deter unlawful state activity in the investigation of civil cases. It is not.

Evidence which is relevant and trustworthy should not be excluded unless strong policy considerations necessitate a contrary rule. *Mapp v. Ohio*, supra, is predi-

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[2] *Camara* and *See* were decided in 1967. The events in this case occurred in 1966. The hearing on the Motion to Suppress Evidence and the trial were conducted in 1968. Regardless of merits, a question naturally arises as to the retroactive application of *Camara* and *See* to events which preceded those decisions. See *Stovall v. Denno*, 388 US 293 (1967). The retroactivity problem is but one more indication of the inappropriateness of these facts for the resolution of the issue which petitioner wishes to be decided.

cated upon: (1) the existence of a pattern of Fourth Amendment violations by police in the conduct of criminal investigation due to the particular nature of the war against crime, and (2) the inability and failure of the state to develop alternative mechanisms for the effectuation of the Fourth Amendment. Because it serves to remove the evidentiary profits of a bad search, the exclusionary rule was found to be the only feasible mechanism to deter police officers from the conduct of unreasonable searches.

Investigation preparatory to civil litigation, unlike criminal investigation, is not by its very nature fraught with dangers to civil liberties. No analogy can be made out between the petitioner's abandoned flat wheeled roller in the burned out forest and the papers recovered from Dollree Mapp's bosom. Petitioner has failed to demonstrate by the facts of this case or a review of similar cases a pattern of Fourth Amendment violations in civil litigation so threatening as to demonstrate a need to deter foresters from violation of law. It is indeed hard to conjure Norris Joyce and his mechanics examining the road roller in the woods, if unchecked by law, as the forerunners of a police state.

Because civil litigation is by its very nature different than criminal litigation and because its sanction is so less harsh, it is not necessary to invoke the drastic remedy of the exclusionary rule. There is no reason to blind the jury to trustworthy evidence where alternate remedies can be fashioned. In the nature of things, civil defendants are usually solvent. In this case, the prayer

asks for almost a million dollars. Governments and juries are generally more sensitive and responsive to the complaints of such persons than to complaints of those who are most commonly associated with the world of crime. Further, they may be expected to have the wherewithal to bring a civil suit for violation of their civil rights if they are truly aggrieved and not merely defending against their obligation to make good to the public the cost of their negligence.

The opinion below summarizes our arguments well:

> "In summary, we do not find that illegal searches and seizures outside the area of law enforcement officers investigating crimes occur frequently. In addition, we have not been shown, if such were the practice, that remedies other than exclusion of evidence would be inadequate to deter the continuance of such practice. On the other side of the ledger, we continue to regard a trial as a search for the truth and, therefore, competent evidence should never be excluded except for the most compelling reason. We hold that illegally seized evidence should only be excluded in a criminal or quasi-criminal proceeding and if obtained by law enforcement officers investigating criminal activity. The order of the trial court excluding the evidence was in error." 478 P2d at 638-639.

CONCLUSION

Because the facts of this case are not satisfactory for the resolution of the issue which petitioner seeks to pose, and because the decision of the Supreme Court of Oregon was correct on the merits, the writ of certiorari should be denied.

Respectfully submitted,

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